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Missouri Supreme Court

REPORTS

OF

CASES ARGUED AND DECIDED



IN THE

SUPREME COURT

2849 F

OF THE

STATE OF MISSOURI,

FROM 1840 TO 1842.

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BY S. M. BAY,

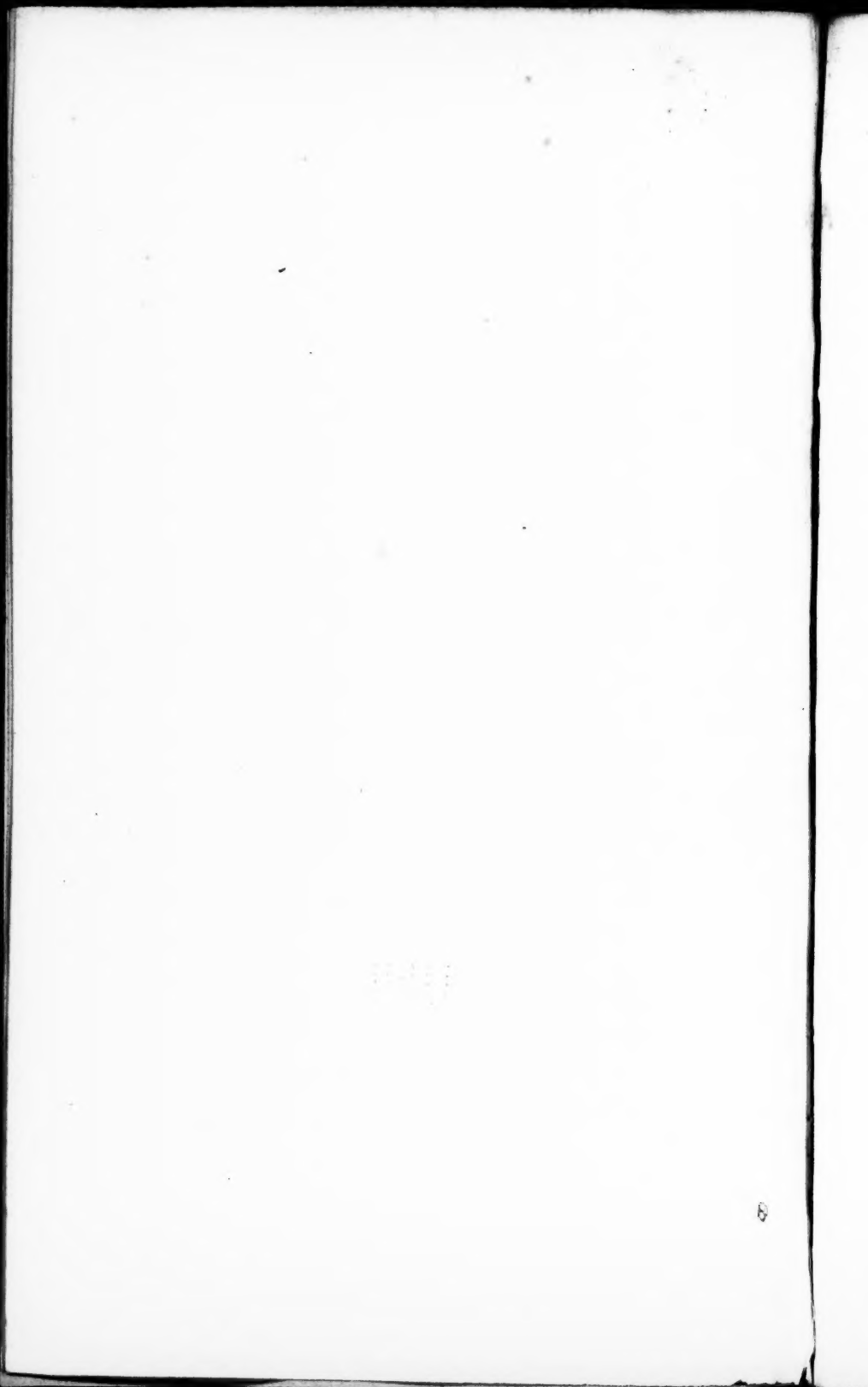
ATTORNEY GENERAL, AND, EX OFFICIO, REPORTER.

VOL. VII.

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1843.



JUDGES
OF
The Supreme Court
OF THE
STATE OF MISSOURI,

DURING THE TIME OF THE SEVENTH VOLUME OF THESE REPORTS.

Hon. GEORGE TOMPKINS, Presiding Justice.

Hon. WILLIAM BARCLAY NAPTON,

Hon. WILLIAM SCOTT.

ATTORNEY GENERAL,
SAMUEL MANSFIELD BAY.

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DECISIONS
OF THE
SUPREME COURT OF MISSOURI.

THIRD JUDICIAL DISTRICT,

MAY TERM, 1841.

BASCOM, impleaded with MYLIUS, v. YOUNG.

1. It is error to enter judgment against a party who has not been served with process, and does not answer to the action.
2. Money borrowed by a partner in the name of the firm becomes a partnership debt, unless the lender knew, or had reason to believe, that the borrower wanted the money for his own private use, or the transaction was out of the ordinary course of business.

Appeal from the St. Louis Circuit Court.

Polk for Appellant.

1st. That judgment was rendered by the circuit court against the two defendants, Mylius & Bascom, although Mylius was not served with process and did not appear to the action. See 3 Blk. Com. 279 *et seq. et passim*.

2. That the finding of the jury is against the weight of evidence. That the evidence as preserved in the bill of exceptions, shows that the money for which the note sued on was given, was obtained for the individual use of Mylius, and not for the benefit of the firm, and that the circumstances were such as must have satisfied the defendant in error of that fact.

SUPREME COURT OF MISSOURI,

MAY TERM,
1841.*King and Tunstall for Appellee.*

Bascom, im-
pleaded with
Mylius,
v.
Young.

The circuit court committed no error in this case.

1st. *He* did not err in his instructions to the jury.

2. The jury committed no error in finding their verdict from the evidence for Young.

3. The court did not err in refusing to grant a new trial in this case.

4. The plaintiff in error, Bascom, cannot get relieved from the payment of this note, unless he could show from the evidence in the case that Mylius and the defendant in error, Young, both knowingly and intendingly confederated together to commit upon him a fraud. See 1st vol. of Leigh's *nisi prius*, and the authorities there cited, page at top 352, on the subject of partners; also, page at top 353, &c.

5. And there is no testimony in this cause showing this fact, or even intimating of it. So far as Young was concerned, it was on his part a fair and bona fide transaction; the money by him was advanced to Mylius, upon the credit of the firm of Mylius and Bascom.

6. The proof shows that they were in partnership, and so continued in partnership, for there has been no announcement of a dissolution as yet, and the law affixes this responsibility on Mr. Bascom; and if he has associated with him a bad man in business as a partner, he must take the consequence of his partner's acts, and not expect innocent persons to suffer in consequence of his alliance with him, by his own voluntary act.

BASCOM, impleaded with MYLIUS, pl'tiff in error, v. YOUNG, defendant in error.

Polk for Appellant.

This case differs in no material respect from the other case between the same parties numbered 5, of the returns to this term, except that the judgment before the justice of the peace, where the action was originally commenced, was against the plaintiff in error, and not in his favor, as in the other case.

King and Tunstall for Appellee.

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Opinion of the Court by Tompkins, Judge.

MAY TERM,
1841.

Young commenced two actions, before a justice of the peace, against the appellants, Mylius and Bascom, both founded on notes. Notice of the actions were served on Bascom; but was returned by the officer that Mylius was not found. In the one case the judgment of the justice was for the defendant, Bascom; and in the other for the plaintiff, Young. Appeals to the circuit court were taken in both cases. Young took his judgments in the circuit court against the defendants; and in each cause, and in every entry of each days' proceedings, Mylius and Bascom are named either as defendants, or in their accidental character of appellants or appellees. It was proved that Mylius and Bascom were partners in an establishment for selling jewelry; that some time in the year 1839, Bascom was absent from St. Louis, in the east, for the purpose of purchasing supplies for this establishment: and that during his absence the several sums of money for which these notes were executed by Mylius in the name of the firm, viz: John P. Mylius & co. The one was for \$150, the other for \$120. Young kept an exchange office in St. Louis. It was also proved by him that, during the said absence of Bascom, Mylius had executed notes in the name of the firm to other persons, which Bascom, after his return, had paid. The consideration of these other notes was jewelry. Other evidence was given, which it is not material to notice here.

Bascom, im-
pleaded with
Mylius,
v.
Young.

The plaintiff in error, Bascom, contends that the judgment of the circuit court ought to be reversed: First, because judgment is taken against Mylius and Bascom, when Bascom alone was summoned; and secondly, because it does not appear that the money was borrowed for the use of the firm, and that to deal in money was not in the course of their trade.

The first objection to the judgment appears to be well taken. Young, the defendant in error, should have taken judgment against Bascom only. But it does not appear from any evidence in the cause, that Young had any reason to believe that Mylius wanted this money for his own pri-

It is error to enter judgment against a party who has not been served with process, and does not answer to the action.

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1841.

Bascom, im-
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vate use only, and the amount of both notes was so small, that it might well have been necessary to the firm in the ordinary transaction of its business on such an occasion. Bascom appears from the evidence to have had all the capital used in the trade: he was absent for the purpose of purchasing goods, and that amount of money borrowed might probably enough have been necessary to the firm. He seems to have misplaced his confidence; for Mylius appears by the evidence to have absconded before Bascom's return to St. Louis. It is then more fit that he should bear the loss consequent on the improper conduct of his partner, than that Young, who does not appear to be privy to any fraudulent intent on the part of Mylius, should bear it.

The circuit court, then, in my opinion, committed no error in refusing Bascom a new trial; but because its judgment was for Young against both Mylius and Bascom, when Bascom alone had been summoned, its judgment ought, in my opinion, to be reversed; and such being the opinion of Judge NARTON, its judgment is reversed; and this court directs the clerk to enter up judgment against Bascom alone, against whom the circuit court ought to have entered up judgment.

MAGEHAN V. ORME & SPEERS.

1. Where replications are not filed within the time prescribed by the statute, and no objections are made to the filing of them after that time, and no motion made for a judgment of non-suit; after verdict for plaintiff, it is too late to raise the objection.
2. Unless all of the testimony is preserved in a bill of exceptions, this court will presume that the judgment of the circuit court, in the admission or exclusion of evidence, is correct.

Appeal from the St. Louis Circuit Court.

T. Polk for Appellant.

1. That the court below ought to have admitted the deposition of Joseph Dowling to be read to the jury.

2 That the replications of the defendants in error to the pleas of the plaintiff in error, not having been filed for three terms after the one at which they ought to have been put in, were irregularly filed, and judgment of *non pros* ought to have been entered up against them. See Code of 1835, page 458, sect. 9; 1 Chits. Pl. 257; Pugh v. Robinson, 1 T. R. 118.

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Magehan,
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Darby for Appellee.

It would be difficult for this court to decide that the circuit court erred, when no evidence whatever is preserved in the record. Hughes v. Ellisan, 5 vol. Mo. Decisions, page 110. The deposition of Dowling was properly rejected.

Opinion of the Court by Napton, Judge.

This was an action of assumpsit brought by the plaintiffs below against defendant, upon the common counts. The pleas were non-assumpsit and set-off. Replications were not filed until the third term after the pleas were put in. The plaintiffs had judgment, and defendant moved for a new trial, which was overruled. He then appealed.

The bill of exceptions does not preserve any of the testimony of the case, but shows that a certain deposition was offered to be read in evidence by defendant, and was objected to by plaintiffs, and rejected by the court, to which opinion of the court the defendant excepted.

Only two points have been raised on this record. It is first objected, that the replications were improperly filed; and, secondly, that the deposition was improperly excluded.

Our statute requires replications to be filed within thirty days of the commencement of the term at which the defendant is bound to appear. In this case the statute was not complied with; but no objection seems to have been taken to the filing of the replications, and no motion was made for a judgment of non-suit against the plaintiff. It is too late to raise the objection here.

In relation to the exclusion of Dowling's deposition, this court has nothing on the record to rebut the legal presump-

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Unless all of the testimony is preserved in a bill of exceptions, this court will presume that the judgment of the circuit court, in the admission or exclusion of evidence, is correct.

tion in favor of the correctness of the action of the circuit court. It is not specified what objections were made to this deposition, nor can its relevancy or irrelevancy be ascertained, none of the testimony being preserved in the bill of exceptions.

Judgment is therefore affirmed.

WEIMER, Appellant, v. MORRIS, Appellee.

If a party, by negligence, suffers a judgment by default to go against him, it will not be set aside to admit a defence which the party might have made had he used due diligence.

Appeal from the Circuit Court of St. Louis county.

Gamble for Appellee.

The error assigned is, that the court refused to set aside the judgment by default.

The decision of the court below was correct.

1st. Because the affidavit swears to no defence to the action.

2d. Because there was no diligence in making a defence. Lecompte & wife, vs. Wash, 5 Mo. Rep. 557.

3d. That the motion was not made in time, being after damages were assessed. Revised Code 460, sec. 31.

Opinion of the Court by Tompkins, Judge.

John P. Morris brought his action in the circuit court of St. Louis county, against John M. Weimer. That court gave judgment for Morris; to reverse which Weimer appeals to this court. The judgment was taken by default, and there was a motion to set it aside, which was overruled. The bill of exceptions shows that Weimer swore that shortly after the service of the summons in the case, he saw

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George W. Call, the maker of the note on which the action was founded, and for whose accommodation the defendant Weimer indorsed the same, and the said Call told Weimer that he would attend to the whole business himself, and gave such repeated assurances to that effect that he, Weimer, relied on him entirely, and supposed that said Call had attended to it; and but for that circumstance Weimer said he would have made a defence to the action. Weimer further stated in his affidavit, that since the rendition of the judgment against him, he has been informed, and believes, that there was no legal consideration given by the said plaintiff to said Call for a large part of the sum specified in said note, and that an usurious interest at the rate of seventy-two per cent. was exacted on the same. All which he believes he can, if permitted, prove to the court.

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Morris.

Had Weimer pleaded to this cause, and diligently made such defence as he could, and then after judgment rendered against him disclosed this evidence, declaring that he had not been able, by using due diligence, to discover the same before trial, it might have been good reason why a new trial should have been granted to him. But after having by the most gross negligence suffered a judgment by default to go against himself, he comes in to claim that indulgence which can be shown only to the diligent.

If a party, by negligence, suffers a judgment by default to go against him, it will not be set aside to admit a defence which the party might have made had he used due diligence.

The judgment of the circuit court is affirmed.

WIDOW and Heirs of JAMES MACKAY v. P. M. DILLON.

1. The treaty by which Louisiana was acquired, imposed only a political obligation upon the government of the U. S. to perfect the titles, rights and claims originating under the former government. The treaty itself did not, as in the case of the Florida purchase, operate as a confirmation. This political obligation, sacred as it is, cannot be enforced by the judicial tribunals.
2. When the government exercises its powers, and confirms the land to one claimant, it must necessarily be to the extinction of any more inchoate title in another. The oldest confirmation, like the oldest patent, must prevail, at least in ejectment.
3. The act of Congress of June 13th, 1812, confirmed the claim of the

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inhabitants of St. Louis to the commons adjoining that town, and that act of confirmation embraced the commons as defined in the survey of 1806. Therefore, a party claiming under the inhabitants of St. Louis, must prevail over a party who claims under a title confirmed by the act of 4th July, 1836.

Error to St. Charles Circuit Court.

Lawless for Plaintiffs.

It will be contended on behalf of plaintiffs, that the court erred in instructing the jury that the claim of the inhabitants of the town of St. Louis was confirmed to the exclusion and extinction of the title of James Mackay.

It will be contended that the court did not err in excluding the sheriff's deed to Frederick Dent. It will also be contended that the circuit court did err in admitting the proceedings before the commissioners on the claim of commons, to be read in evidence against the plaintiffs.

As to the error of the court below in its instruction with reference to the city title, the plaintiffs will rely on the treaty of cession—the law of nations—the divers acts of congress from 1815, to 4th July, 1836, to show the validity and inviolability of the title of plaintiffs under James Mackay, their ancestor. The plaintiffs will rely on the act of 13th June, 1812, sec. 1, and on the nature of the claim and title to commons here set up, to show that that act did not, in terms or in spirit, confirm the claim of 14,000 acres, made by certain inhabitants, and at their request surveyed by Mackay in 1806. See *Lawless v. Newman*, 6 Mo. R. 279. As to the sheriff's deed to Frederick Dent, the plaintiffs will contend that it conveyed no land whatever to Dent; that it was totally void, because, among other reasons:

1st. Of the uncertainty of description. See 8th Johns. Rep. 520; 13 Johns. Rep. 537; *ibid.* 340; *ibid.* 37, 577.

2d. Because the executors of Mackay had no estate or interest in the land in question in their hands to be administered.

3d. That their testator, James Mackay, had no estate or interest in the land that could be conveyed by him, either as a legal estate or a trust estate, or right in equity to land, or

which could be the subject matter of the lien of a judgment against either him or his executors, at the date of the judgment rendered in favor of J. & B. Pratte, on which could be levied on or sold under execution.

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Gamble for Defendant in Error.

1. That there was here a claim to commons, as originating under the Spanish government, presented before the proper tribunals of the American government for adjudication, and upon which the government of the United States itself passed, by the act of 13th June, 1812. 2d Story's Laws U. States, 1259.

2. That the claim to commons did not require that there should be any grant of commons in the sense in which the word grant is understood, when applied to the claim of an individual; but any dedication to public use, any user of the property as commons, any recognition of the existence of such right of common by the competent authority of the country, or acknowledgment of the existence of such commons, or reservation, for such use, is a good basis of such claim, under either common or Spanish law. 10 Peters, U. States v. The City of New Orleans; 12 Peters, Strother v. Lucas, in the notice to the opinion of the court.

3. That the claim for commons as made, was upon a recognition of the existence of commons under the Spanish government, by the lieutenant governor who signed and approved the regulations adopted in relation to the commons, by the Syndics of St. Louis; and whether the claim calls the act of the lieutenant governor a *decree*, or uses any other name, it is equally available.

4. That the right of common was under the Spanish government at least as meritorious as the claim of the land by an individual; and if it has been confirmed by the gov't. of U. S. its merit has been abundantly recognised.

5. That the claim to common as filed before the board, with the survey made by Mackay, was a claim to all the land within the exterior boundary of that survey, notwithstanding the pretensions of Mackay and others were laid down.

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The correctness of this position is shown by examining the claim for a specific quantity of land, and the survey whose exterior boundary embraces that quantity.

6. That the confirmation by the act of 13th June, 1812, was a confirmation of the claim as exhibited before the board.

7. That such confirmation was equivalent to, and was a grant. Strother v. Lucas, above.

8. That such confirmation, made by act of congress, being a valid title to support and defend actions of ejectment, is a better legal title than any younger confirmation, whether by act of congress or otherwise. See statute upon action of ejectment.

9. That if there had been any pretension to the land remaining in Mackay, after act of 13th June, 1812, that pretension was utterly extinguished by force of the act of 26th May, 1824. 3 Story, 1959, secs. 5 & 7; and the title of commons had no shadow upon it.

10. That the fact of confirmation under act of 4 July, 1836, gives no authority to courts or individuals, to draw in question the correctness of the action of the sovereignty in confirming by act of 13 June, 1812.

Opinion of the Court by Napton, Judge.

This was an action of ejectment brought by the plaintiffs to recover a tract of land lying south of the city of St. Louis.

The plaintiff claimed title under a concession to him of about two hundred arpens, by metes and bounds, made by Charles Dehault Delassus in 1799; a survey made by Soulard of 288 arpens, in 1802; reported for confirmation by the last board of commissioners, and confirmed by the act of July 4th, 1836.

The first board of commissioners expressed an unfavorable opinion of this claim, intimating that it was ante dated. In 1813, the recorder confirmed 30 arpens of the claim, being all not included within the limits, or supposed limits of

the commons; that being abandoned by Mackay's agent. MAY TERM,
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In 1833, the last board of commissioners, after an examination of the claim and testimony relating thereto, pronounce it a good one, and recommend it for confirmation, which was accordingly effected by the act July 4, 1836. Widow and
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Two separate and distinct titles were relied on in defence. The defendant first claimed under a judgment and execution against the executor and executrix of James Mackay, and a sheriff's sale and deed.

Secondly, defendant claimed under the confirmation of the commons of the town of St. Louis, by act of 13 June, 1812, and conveyance from the city authorities of St. Louis.

The title to the commons was as follows:—A claim for 4293 arpens, situate adjoining the town of St. Louis, known by the name of the St. Louis commons, and said to have been granted by a decree of the Lieut. Governor Cruzat, in 1782, was filed in the office of the recorder. At the same time was filed a document containing the proceedings of certain inhabitants of St. Louis, for the appointment of Syndics, who had authority to regulate the police of the village and the inclosure of its commons. These Syndics, on the 22d Sept. 1782, with the approbation of the lieut. governor, proceeded to establish certain regulations concerning the enclosure of the commons, and these regulations were signed by the said Syndics, and the lieutenant governor *himself*.

A survey of the common was made by James Mackay, in 1806, at the request of the principal inhabitants; in the notes of which survey, Mackay states it to contain 4293 arpens; and that, by the request of the inhabitants, he had marked down the *pretensions* of six individuals to lands within the commons, including his own.

In 1806, the claim was submitted to the board, and they reported it to be equitable under the Spanish usages. In 1812, a majority of the commissioners rejected the claim. On the 13th June, 1812, the act of congress was passed, by which the claim of St. Louis, and several other villages to commons, was supposed to be confirmed.

Evidence was taken before the commissioners, and also read on the trial in the circuit court, conducing to show the

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user of these commons for many years prior to the change of government in 1804.

The plaintiff below applied to the court for the following instructions, the first of which was given, and others refused:

1. That the sheriff's deed, and the proceedings in the case of J. & B. Pratte, against Mackay's executors, be excluded.

2. That Mackay's survey of commons, preserving Mackay's claim on the n. east part thereof, is conclusive that the claim of commons did not extend over Mackay's claim, as between those claiming the common and his heirs.

3. That Mackay's survey of commons, including his claim, is good evidence to the jury that the claim of commons did not extend over, and cover Mackay's claim.

4. That the deed from the city to Dent, conveyed no title under which the defendant can justify in this action.

At the instance of the defendant, the court gave the following instruction:

"That the claim of the inhabitants of the town of St. Louis to commons, as exhibited upon the copy of the claim given in evidence, was confirmed by the act of congress of the 13th June, 1812, to the inhabitants of said town according to the claim, and that the title to the land so confirmed, is a vested title against the title of the plaintiff under the confirmation of the act of congress of the 4th July, 1836."

This instruction was excepted to by plaintiff, and the jury found a verdict for defendant.

The title of the defendant under the sheriff's deed, having been excluded by the court below, was not therefore discussed at the bar, and will not be noticed by the court. The title under the commons will alone be considered.

If it were conceded, that the act of 13th June, 1812, confirmed the claim of the inhabitants of St. Louis to the commons, as exhibited before the board of commissioners, there would be, I apprehend, but little room to question the propriety of the instruction given by the circuit court.

The treaty
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imposed only
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It appears to be well settled, that the treaty by which Louisiana was acquired, imposed only a political obligation upon this government to perfect the titles, rights and claims

originating under the former government. The treaty itself did not, as in the case of the Florida purchase, operate as a confirmation. This political obligation, sacred as it is, cannot be enforced by any action of the judicial tribunals. The legislation of Congress, from 1804 to the present day on this subject, is obviously based upon this supposition. They have established, from time to time, tribunals to investigate these claims, and from time to time have confirmed such as they thought just, and rejected such as were supposed to be unfounded. They have afforded every facility to claimants, and seemed anxious to retain the title themselves no longer than the conflicting rights of others could be examined and decided.

The federal government, being unable to confirm the same land to two adverse claimants, must then, to some extent, determine between the conflicting titles.

Each claimant depends upon the justice or comity of the present government; and when the government exercises its powers, and confirms the land to one, it must necessarily be to the extinction of any mere inchoate title in the other. The oldest confirmation, like the oldest patent, must prevail, at least in an action of ejectment.

If, therefore, the act of 13th June, 1812, confirmed the claim of the inhabitants of St. Louis to 4293 arpens of commons, that confirmation must prevail over the confirmation to Mackay, in 1836, whatever may be the comparative merits of their respective claims under the Spanish government, except the interposition of this government was unnecessary to perfect the titles.

The strength of the defendant's title must rest on the supposed confirmation of the commons, by the act 13 June, 1812. The proper construction of that act presents the only difficulty in this case.

That the phrase "rights, titles and claims," implies something more than grants or concessions, and will embrace such claims as rest on mere inhabitation, cultivation, and the usages and customs of the country, is distinctly declared by the supreme court of the United States in various decisions, and particularly reiterated in the case of *Lucas v. Strother*,

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ligation upon the gov. of the U. S. to perfect the titles, rights and claims originating under the former gov't. The treaty itself did not, as in the case of the Florida purchase, operate as a confirmation. This political obligation, sacred as it is cannot be enforced by the judicial tribunals.

When the government exercises its powers, and confirms the land to one claimant, it must necessarily be to the extinction of any mere inchoate title in another. The oldest confirmation, like the oldest patent, must prevail, at least in ejectment.

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(12 Peters.) The existence of a commons in St. Louis, is clearly ascertained, as far back as 1782, when certain regulations were made by the Syndics, in conjunction with, and under the direction of the lieut. governor. The precise limits of the commons at this time were not so well established. From the testimony of the old inhabitants, as preserved in the office of the recorder, and submitted to the jury who tried this case, it may at least be inferred, that from time to time the common was enlarged, as the increase of population required, and it was probably some years after the date of the regulations of Cruzat and the Syndics, that it reached the extent claimed in 1806. There is, however, abundant testimony that the boundary claimed in 1806 had been established before the transfer in 1804, though no survey had been made.

A mere claim, unsupported by any shadow or pretence of right, is clearly not such a claim as any act of congress could confirm. The force of the term confirmation, of itself, implies some sort of a title in previous existence. Whilst the word claim could not be justly interpreted in so broad sense as this. Yet neither is it to be so restricted as to exclude every thing which the previous words "rights and titles" might embrace. Claims are doubtless mentioned, in order that the act might be sufficiently large to embrace every species of proprietary interest set up against the government, whether founded on concessions, grants, uses, or any other inchoate title by which, under the laws and customs of the Spanish government, property could be severed from the King's domain, and equitable titles created.

The existence of a commons adjoining the village of St. Louis, of some extent, since the first establishment of a French post there, is undeniable. All the witnesses examined before the board concur on this point. The act of 1812, confirmed the claim of the inhabitants to commons; and the inquiry is, to what extent did that confirmation reach. Did it embrace the commons as they existed under Cruzat's administration, or as defined in 1806 by Mackay, and submitted to the board and recorder, and rejected by the majority of the board? The *claim* was confirmed, and I

confess it is difficult to perceive how any other claim could have been contemplated than the claim to 4293 arpens, which had been urged upon their agents in this territory, and preserved in the official records of the government.

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The act of 1812 confirms the claims to town lots, out lots, common field lots, and commons, to the claimants, according to their several right or rights in common thereto." It is supposed that this last clause is proof conclusive that only such claims as were founded on *right* were designed to be confirmed. To this interpretation I have no objection, as it may be fairly presumed, in justice to our national legislature, that unjust claims were not intended to be confirmed. But what tribunal can look behind the confirmation of congress, and investigate the justice of their grants. Here was an exercise of political power by the federal government, in the fulfilment of the treaty obligation; and the judicial tribunals of the country cannot inquire whether this power has been judiciously and honestly exercised. Congress may have confirmed the least equitable title; but having done so, that title cannot be disturbed.

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The act of congress of June 13, 1812, confirmed the claim of the inhabitants of St. Louis to the commons adjoining that town, and that act of confirmation embraced the commons as defined in the survey of 1806. Therefore, a party claiming under the inhabitants of St. Louis, must prevail over a party who claims under a title not confirmed by the act of 4th July, 1836.

There is one view of this subject which appears to me strongly to corroborate the idea, that the act of 1812 was designed to confirm the claim to the specific quantity of land, asked for as commons by the inhabitants of St. Louis. If it were the design of congress to limit their confirmation to only so much land as might, upon judicial investigation, prove to be justly claimed of the Spanish government, either by user or grant, it seems very strange that a special act, or special provisions in the same act, were not framed to meet such a case. The words of the act which was passed, are certainly general enough to embrace the whole claim as it was on file in the recorder's office, and the United States must therefore have intended to part with all their title and claim to this tract of land.

I conclude, then, that the defendant claiming under the inhabitants of St. Louis, whose claim was confirmed 13th June, 1812, must prevail over the plaintiff who claims under a title which was not perfected until 1836.

Judgment affirmed.

MAY TERM,
1841.

CHOUTEAU V. ECKERT.

Chouteau,
v.
Eckert.

Ejectment: Plaintiff claimed under, 1st, A concession from the Lt. Gov. of Upper Louisiana, dated 26th Nov. 1801, founded on a former grant alleged to have been made in 1787, by the then Lt. Gov. of U. L. 2d, The proceedings of the board of commissioners, under the act of Congress of 1832 & 3, confirming said claim. 3rd, The act of 4th July, 1836, and a survey by the U. S. under said act. The premises in controversy were part of the St. Charles commons, and defendant claimed under the inhabitants of that town. The court adhere to the decision made in *Bird v. Montgomery*, (6 Mo. R. 510,) viz: The confirmation by the act of 4th July, 1836, cannot prevail over the previous confirmation to the inhabitants of St. Charles by the act of 13th June, 1812.

Appeal from St. Charles Circuit Court.

Lawless, Bogy, and Hunton for Appellants.

The jury found a verdict for defendant. It is contended that the judge erred in the above instruction, in this:

1st. That a matter of law was left to the jury, to wit: whether a survey had been made by the authority, and under the orders of the Spanish lieutenant governor of Upper Louisiana, of lands for commons, so as to include the premises in controversy.

2d. That the above instruction excludes from the jury all consideration of the original grant of said land to the said plaintiff, and the confirmation of said grant, by the act of 1836, to plaintiff, by congress of the United States.

3d. That it is manifest from the above evidence spread on the record on each side, that:

1st. The government of Spain, nor any other in Upper Louisiana, granted as commons the said tract in question to the town of St. Charles, but on the contrary refused to grant that, or any other land to the town of St. Charles as commons.

2d. That said survey is not only not made under any authority of a Spanish lieutenant governor of Upper Louisiana, but in direct and manifest disregard and violation of the special order, and decree of that officer, touching the land adjacent to the town of St. Charles, and including the tract in controversy.

3d. That said instructions wholly disregard the treaty of cession, the law of nations, the decisions of the board of commissioners, the act of 4th July, 1836, and the survey of the plaintiff granted lawful property under said act.

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1841.

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Eckert.

The counsels for plaintiff will rely in argument on the treaty of cessions; the law of nations; the divers acts of congress; the act of 1812, sec. 1; the act of 1832; and 3d and 4th of July, 1836; the decision of the United States supreme court, in 6 Peters, in the case of Chouteau Delassus, Mackay and Soulard, on appeal from Judge Peck; and many other cases; and also that of Newman vs. Lawless, Mo. Rep. 5 vol. page 236.

H. R. Gamble.

The documentary commons title is the same as in Bird's case; and I rely upon the decision in that case, and upon the general principles in relation to such titles, as contained in my brief now before the court, in the case of Mackay's heirs v. Dillon.

Opinion of the Court, by Napton, Judge.

This was an action of ejectment to recover a tract of land lying near the town of St. Charles. The judgment of the circuit court was for the defendant.

The title of the plaintiff was as follows:

1st. A concession from the lieut. governor Delassus, dated 26th November, 1801, founded on a former grant, alleged by Chouteau to have been made by Cruzat in 1787.

2d. The proceedings of the board of commissioners under the act of 1832 & 3, by whom said claim was confirmed; and,

3d. The act of 4th July, 1836, and a survey by the United States under said act.

This claim had been rejected by the commissioners in 1810.

The defendant claimed under the inhabitants of the town of St. Charles. The claim to the commons of St. Charles,

MAY TERM,
1841.

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v.
Eckert.

so far as it depends upon documentary evidence, is the same as that contained in the case of Bird v. Montgomery, 6 Mo. Rep. p. 510. The oral testimony of a witness was also taken, the substance of which was that witness came to St. Louis in the winter of 1796, and to St. Charles in the winter of 1798. When he came to St. Charles, the town was surrounded by a fence. The witness, looking on the plat of the survey of the commons, said, that the claim of Spencer, under Rybolt, was granted to conform to the fence of the commons, and to have the fence of the commons as its northern line, and looking upon the plat of the survey given in evidence by the plaintiff, says the whole of the land claimed by the plaintiff's claim, as laid down on that plat, was included in the commons fence, which was standing when he came here, and remained until after 1804.

After the evidence had been submitted, the court instructed the jury, that "if they believed from the evidence that the premises in controversy were included in the tract of land surveyed under the authority of the Spanish government, for the commons of the town of St. Charles, and held by the inhabitants of said town, and enclosed by them as their commons under the Spanish government, the plaintiff's cannot recover in this action."

Ejectment:
Pl'tiff claimed
under, 1st, a
concession
from the lieut.
gov. of Upper
Louisiana, da-
ted 26 Nov.
1801, founded
on a former
grant alleged
to have been
made in 1787,
by the then
lieut. gov. of

There seem to be no questions arising in this case, which were not involved in the case of Bird v. Montgomery, 6 Mo. R. 510. The oral testimony given in this case of the actual enclosure of these commons in 1798, and its continuance until after the change of government in 1804, may give some additional force to the title of the commons as against this plaintiff. The confirmation by the act of 4th July, 1836, cannot prevail over the previous confirmation in 1812.

Judgment affirmed.

U. L. 2d, The proceedings of the board of commissioners, under the act of congress of 1832 & 3, confirming said claim. 3d, The act of 4th July, 1836, and a survey by the U. S. under said act. The premises in controversy were part of the St. Charles commons, and defendant claimed under the inhabitants of that town. The court adhere to the decision made in Bird v. Montgomery, (6 Mo. R. 510,) viz: The confirmation by the act of 4th July, 1836, cannot prevail over the previous confirmation to the inhabitants of St. Charles, by the act of 13th June, 1812.

THIRD JUDICIAL DISTRICT.

19

THE CITY OF ST. LOUIS V. ROGERS.

MAY TERM,
1841.

The statute of set-off (R. C. 1835, p. 579,) is not restricted to natural persons, but extends to corporations, and the right of set-off exists in suits by corporations before justices of the peace.

City of Saint
Louis
v.
Rogers.

Error to the Circuit Court of St. Louis county.

W. Primm for Appellant.

The only question presented by the transcript in this cause is, can a justice of the peace entertain jurisdiction of a set-off against a municipal corporation? The act regulating justices' courts, Rev. L. L. p. 348, §5, declares that no justice of the peace shall have cognizance of any action against a corporation.

Aside from any enactment on the subject, the right of set-off as a defence to an action does not exist, and defendants are thrown upon their cross action.

In England and in this country, the right to plead a set-off as a defence to an action is given by statute.

The act regulating set-off, Rev. L. L. p. 579, §1, applies to cases where there is a reciprocal indebtedness between *natural* persons.

In no part of our laws, except in the criminal code, is the distinction between natural persons and corporations done away with, so that the section 9, p. 354, Rev. L. L. of the act regulating justices' courts, must be construed to give the right of set-off in these courts to natural persons litigant alone.

A party sued by a corporation, then, if he has a demand against that corporation, is thrown upon his cross action, and a set-off filed in such a case, becomes essentially a cross action, of which the magistrate has no jurisdiction. If there be no jurisdiction in the justice, the appellate court cannot have it by the mere fact of the set-off having been filed with the justice of the peace.

A. Hamilton for Appellee.

The question is, can a defendant set-off in a suit brought by a corporation against him before a justice of the peace? And if not, can the set-off be allowed in the upper court?

MAY TERM,
1841.

City of Sanit
Louis
v.
Rogers.

1st. The statute concerning justices' courts, R. C. 354, sec. 9, in express terms, gives the right of set-off, (except in two instances, inapplicable here,) in all cases where such set-off is allowed by the statute regulating set-off, R. C. 579. This latter act, §1, allows the set-off wherever there is a mutual indebtedness between two or more persons. This includes the case in which either or both of the parties litigant are corporations. 15 Johns. R. 381-2, and cases there cited. The act, sec. 4, p. 348, excludes from the jurisdiction of the justices of the peace actions against any rightful executor or administrator, or any corporation. That the legislature did not regard a set-off as an action or mean to deprive the defendant of his set-off in these cases, is manifest, as well from the 9th sec. of the act, which in express terms points to and adopts the statute regulating set-offs, as from the 13th section of the law, p. 355, which recognizes the right of set-off in a suit brought by an executor or administrator, and defines the character and effect of the defence when established. The act concerning revised statutes, secs 26 and 27, p. 383, includes bodies corporate under the general expression "persons."

2d. If not entitled to his set-off before the justice of the peace, the defendant having duly filed it there, can establish it in the upper court, which tribunal is, by the law, as a court of the first instance, where the proceedings are had *de novo*, without reference to the errors of the justice, secs. 8 and 16, pp. 370, 371.

Opinion of the Court delivered by Tompkins, Judge.

The city of St. Louis commenced its suit against Rogers for the sum of fifty dollars and ninety-two cents. Rogers appeared and pleaded an off-set of fifty dollars, which not being allowed by the justice of the peace, and judgment being rendered against him for the whole amount of the demand, he appealed to the circuit court, where his offset was allowed, and the city had judgment for ninety-two cents only.

To reverse this judgment of the circuit court this writ of error is prosecuted. MAY TERM,
1841.

The first section of the act regulating set-off, provides that if any two or more persons are mutually indebted in any manner whatsoever, and any one of them commences an action against the other, one debt may be set off against the other, although such debts are of a different nature; and by the 26th and 27th sections of the act concerning the revised statutes, it is declared that when any person is spoken of, bodies corporate, as well as individuals, shall be deemed to be included. See page 383 of the digest of 1835. But by the 5th section of an act to establish justices' courts, &c., p. 348 of the digest of 1835, justices of the peace are denied jurisdiction of any action against any rightful executor or administrator, or any corporation. This was evidently intended for the convenience of the executors, administrators, and corporations. But we have no evidence that the legislative power desired to deprive any person whom either an executor, administrator, or corporation might sue before a justice, of his right to set-off; although the books tell us that a set-off is in the nature of a cross action. But on the contrary, the 13th section of the 3d article of the act to establish justices' courts, expressly recognize this right as against executors and administrators, and provides that if a balance be found due to such defendant, it shall be evidence of a debt established, but that no execution shall issue thereon; because the estate may not be solvent, and it is the province of the county to settle estates, and order the debts paid as money is raised. No such provision ought to have been made in favor of corporations, and if they elect to descend into the justices's courts, evenhanded justice requires that they should abide the consequence. The legislature never could have intended that such institutions should be protected from the just demands of the defendant in a justice's court while the executor or administrator was expressly made liable for the balance found against him in any suit he might institute before a justice. The judgment of the circuit court ought then to be affirmed, and such also being the opinion of the court, it is affirmed.

City of Saint
Louis
v.
Rogers.

The statute
of set-off (R.
C. 1835, page
579) is not re-
stricted to na-
tural persons,
but extends to
corporations,
and the right
of set-off ex-
ists in suits by
corporations
before justices
of the peace.

SUPREME COURT OF MISSOURI,

MAY TERM,
1841.

HITE v. LENHART, and others.

Hite
v.
Lenhart.

1. The courts of this State will not, ex-officio, take notice of the laws of sister States.
2. Surprise in matter of fact, when due diligence has been used, may be good cause for a new trial. but not surprise, in matter of law.

Appeal from the Circuit Court of St. Louis county.

Crockett & Gist for Appellant.

The appellant assigns for error, that the court should have granted a new trial for the following reasons :

1st. On the ground of surprise, and cites in support, 1 J. J. Mars. Rep. 319-20 : 2 J. J. Mars. R. 515 ; 3 Taunton, 484 : 4 Chit. Practice, 59, 60 ; 7 Taunton, 309 ; 8 Taunton, 730, 1 Black. R. 295-8.

2d. On the ground that the copy of the assignment was improperly rejected by the court. See act of Congress, 1790, approved 26th May, prescribing the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated, &c.)

Geyer & Dayton for Appellees.

It becomes necessary in ascertaining whether the court committed error in refusing a new trial to examine only the two reasons last mentioned, for the counsel for the interpleader must rely solely upon them. As to the first, that the certified copy of the record was improperly excluded from the jury, the interpleader is now, and was on the motion for a new trial, precluded from availing himself of the error of the judge, supposing it was one, for the reason that he took no exception to it at the trial.

Having neglected to take the exception at the proper time, the following authorities will show that the propriety or impropriety of excluding that evidence cannot now be questioned : McGirney v. the Phenix Insurance Company, 1 Wen. R. 86 ; Whitesides v. Jackson, 1 Wend. 418 ; Jackson v. Caldwell, 1 Cow. 638 ; Shepard. et al. v. White, 3 Cowen, 32 ; Friers v. Jackson, 8 Johnson, 495 ; Lanuse v. Barker, 10 John. 312 : Davis v. Burns, 1 Mo. R. 364 ; Bartlett v. Draper, et al. 3 do. 477 ; Swerengen

v. Newman, 4 do. 455; Withington v. Young, 4 do. 563; MAY TERM,
Waldo v. Russell, 5 do. 387. 1841.

But the copy was properly excluded. The original should have been produced or accounted for. See Starkie, 1 vol., 327, et seq.; Session Laws of Mo. 1838, 41; 5 Mo. R. 903; Leuster, 182. As to the other reason, that the counsel was surprised on the trial by the exclusion of the copy, it may be remarked in the first place—That under the instructions given to the jury, by consent of the counsel on both sides, the interpleader could not have been injured by the exclusion of the copy. The only object in offering this copy must have been to establish the fact, that the interpleader was the assignee of L. B. Clark. Under the instructions, the naked question of fraud was submitted to the jury, in determining which, they were directed to consider the circumstances of the sale from Varnum to Hill, upon the supposition that Hite was the assignee of Clark, as represented. The jury therefore passed upon the fact, and found a verdict the same as they would have done had the copy not been excluded.

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v.
Lenhart.

The interpleader, then, ought not to have a new trial granted him on account of the exclusion of this copy, when the only fact it could possibly have been intended to prove was thus fully conceded by the defendant's counsel before the case was passed upon by the jury. Vide Stewart v. Small, 5 Mo. Decisions, 525.

It will be observed that the affidavit of the counsel; and the only one given, says nothing about the merits of the case. It should have stated distinctly, that the interpleader had merits. See Meechum v. Judy, 4 Mo. R. 361; Elliott v. Leach, do. 590. But the affidavit of the counsel in reference to surprise, only shows that he was mistaken in the law, which is no ground for a new trial. Vide Graham's Practice, 508.

The interpleader stood in the relation of plaintiff in the suit, and if testimony important to him were ruled out, he might have taken a nonsuit. Graham's Practice, 269, et seq. But a new trial should not be granted on account of the exclusion of evidence, properly or improperly, when

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1841.

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the testimony was such as, if admitted, ought not to have changed the verdict. By a review of the testimony in this case, it will be clearly seen the jury could not have justly found a different verdict had the authenticated copy offered, or even the original assignment been given in evidence, and had the assignment been fully before them and they found a different verdict, the court would have been strongly called upon to set it aside as against evidence, and grant a new trial.

In relation to granting new trials under such circumstances, vide Graham's Practice, 512, et seq.; 1 Johns. 222, Potter v. Lansing; Oldham v. Henderson, 4 Mo. R. 295; 3 Mo. Rep. 465; 5 do. 489.

Opinion of the Court, by Tompkins, Judge.

Godfrey Lenhart and Robert Barber, composing the firm of G. Lenhart & Co. commenced a suit by attachment in the circuit court of St. Louis county, against John J. Varnum, and attached certain goods, which Ormsly Hite claiming as his own, commenced this suit to obtain them. In the 32d section of the act to provide for the recovery of debts by attachment, it is provided, that any person claiming the goods attached may interplead. Hite, claiming these goods, is then plaintiff in the secondary action against Lenhart & Co., plaintiffs in the original action against Varnum. Hite, plaintiff in this action, to try the right of property in the attached goods, offered in evidence the copy of a deed of assignment under which he claimed, the original being left in Kentucky, because his attorney thought the copy of a deed recorded and duly authenticated would be received in evidence in the courts of this State. The deed was certified under the seal of his court by the clerk of the county court of Jefferson county, in the State of Kentucky, to be truly copied, and the presiding justice of that court appears to have made the certificate required by the act of Congress of 26th May, 1790, to give records and judicial proceedings of

that court such faith and credit in the courts of this State as they have by law or usage in the courts of Kentucky.

Waiving the question, whether the copy of this deed is the thing intended by the act of congress, to be received in evidence under the authority of this act of congress, the counsel of the plaintiff, Hite, has not shown on his bill of exceptions what faith and credit such a copy, by the laws or usages in the courts of Kentucky, would have in that State. The statute law of Kentucky should have been spread upon the record. It is however more usual to enter an agreement on record, that such parts of the statute of a neighboring State may be read from the printed copy: this has not been done. The plaintiff also moved for a new trial on the ground of surprise, having lately come to the State: he was unacquainted with the statute law, and thought such copy was evidence under the statute. Surprise in matter of fact, when due diligence has been used, may be good cause for a new trial, but not in matter of law. Because if due diligence be used, counsel cannot be surprised in matter of law. The judgment of the circuit court is therefore affirmed.

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Hite
v.
Lenhart.

The courts of this State will not ex officio take notice of the laws of sister States.

Surprise in matter of fact, when due diligence has been used, may be good cause for a new trial, but not surprise in matter of law.

GREEN, Appellant, v. GOODLOE, Appellee.

Something more than a mere affidavit of *merits* is necessary, in this State, to authorise the circuit court to set aside a judgment by default. The "good cause," required to be shown, must not only be a meritorious defence, but the exercise of all due diligence by the party

Appeal from the St. Louis Circuit Court.

Polk for Appellant.

The appellant maintains that the court below ought not to have overruled his motion to set aside the judgment rendered against him by the court below for want of a plea, and to grant him leave to plead issuably to the merits instant, and relies on the following positions:

1. That the affidavit of the defendant below shows a good

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1841.

Green
v.
Goodloe.

cause for setting the judgment aside. Stat. of Mo. p. 460, s. 31; 1 Tidd's Practice, 507-8: 3 Chit. Gen. Practice, 680, 681.

2. The affidavit shows that the defendant below used due diligence to avail himself of his defence. 4 Mo. Rep. 557, Lecompte and wife v. Wash.

————— *for Appellee*

The main question is, whether the court below did right in refusing to sustain the motion to set aside the judgment? The defendant in error holds the affirmative, and cites the the following authorities to show that the affidavit does not show sufficient diligence on the part of Green. 4 Mo. Rep. 557: Rev. Code, 460, sec. 31, &c.; 6 Wend. Rep. 517.

And further, that this is not such a judgment as will authorise an appeal.

Opinion of the Court by Napton, Judge.

Goodloe sued the appellant by petition in debt on two promissory notes. The defendant was personally served with process, and on the third day of the return term (July 22) judgment was rendered against him by default. The court adjourned over from the sixth day of August until the 24th of the same month, when the defendant filed an affidavit and moved the court to set aside the judgment by default, and grant him leave to plead issuably to the merits instant, which motion the court on a subsequent day considered and overruled. To this decision of the court the defendant excepted.

The affidavit of Green swears to the existence of credits and offsets, and also states certain circumstances which has induced a belief in his mind that the notes have been paid, by giving other notes in exchange for them. The affidavit also states that the affiant intended to plead to the said action, and for that purpose had called upon an attorney, but had not found him at his office, and supposing that if his pleas were put in by the sixth day of the term, they would be in

time, he did not again call on his attorney until Friday of the first week of the term, when he was informed that judgment had gone against him by default.

MAY TERM,
1841.

The only question is, whether the court erred in overruling the motion to set aside the judgment by default.

Greene
v.
Goodloe.

It appears to be settled by former decisions of this court that something more than a mere affidavit of *merits* is necessary in this State to authorise an exercise of the power given to the court by our statute over judgments by default. The *good cause* required to be shown, must not only be a meritorious defence, but the exercise of all due diligence by the party.

Something more than a mere affidavit of *merits* is necessary in this State, to authorise the circuit court to set aside a judgment by default. The "good cause" required to be shown, must not only be a meritorious defence, but the exercise of all due diligence by the party.

In this case this court is of opinion, that the affidavit does not show due diligence.

Ignorance of the law does not excuse a party from the exercise of that diligence. The defendant after having been a month served with personal process, calls at the office of a lawyer on the first day of the term, but not finding him, gives himself no further trouble about the matter until the fifth day of the term, when he ascertains judgment has gone against him. Moreover, the very nature of the defences, which are alleged in the affidavit to exist, show plainly that witnesses must have been requisite to establish them, and yet none seem to have been subpoenaed. It would seem to be the part of a prudent man, who believed himself able to make a good defence, in a suit of this kind, in which the issue must be made up and tried at the first term, to prepare himself for such defence in the usual way. It does not appear from the affidavit that this was done.

Judgment affirmed.

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1841.

OTT V. GARLAND.

Ott
v.
Garland.

A parol agreement for the conveyance of land, constitutes a valuable consideration, in law, for a note given for the purchase money, where the purchaser is in possession of the land, and a deed has not been refused.

Appeal from St. Louis Circuit Court.

B. Allen for Appellant.

1st. The statement of the evidence evinces that the verdict was against evidence, &c.

2d. It and the case of Austin, et al. v. Blue, lately decided in the supreme court, as to what is a negotiable note, and our statute, supports the other position taken on the new trial. And,

3d. If a negotiable note, the defence is still good. See Bayly on Bills, 544, and seq.

F. W. Risque for Appellee.

In support of the verdict and judgment in the court below, the appellee, by his counsel, refers the court to the following authorities :

Revised Code 1835, page 104, sec. 1; title, Bonds & Notes;
 same, " " 105, " 6; same;
 same, " " 449, " 1; Practice at Law;
 Austin & al. v. Blue, late decision supreme court at Palmyra.

Opinion of the Court by Tompkins, Judge.

Garland obtained judgment in the circuit court against Ott, on a note made by him to one Sanford, and by Sanford assigned to Garland, the appellee. Ott pleaded that the note was made without consideration. After judgment he moved for a new trial.

Elias T. Langham, a witness produced by the defendant Ott, testified that the note was given in consideration of a lot of ground in St. Louis county, to be conveyed by said

Langham to the defendant; that the deed had never been made to the defendant; the witness stated that he had sold said lot to Wm. T. Sanford, same above mentioned, and purchased it again; that the note was made payable to Sanford to secure one Brent in a sum of money which he owed to said Brent; that these circumstances were known to Sanford when he received the note, and that the indorsement to Garland was to enable him to collect the money. The witness stated that there was nothing in writing betwixt him and the defendant relative to the conveyance of the said land by witness; but that the defendant was in possession of the land, and had been making improvements on it, and that he was ready to make a deed to the defendant; but that none had been either tendered or demanded.

The evidence in the cause seems to me to be sufficient to prove a valuable consideration. If, indeed, the defendant have reason to believe that, although he is in possession of the land, and Langham is ready to make a deed, yet that the title of Langham is not secure, his remedy is in a court of chancery, where such matters are properly cognizable. But as there has been a possession taken by him, and for some time held, and as it is proved that although no tender of a deed has been made, yet he has not demanded one, and still remains in possession, this court cannot say that there is not a sufficient consideration for the execution of such note.

The judgment of the circuit court is therefore affirmed.

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1841.

Ott
v.
Garland.

A parol agree'm't for the conveyance of land, constitutes a valuable consideration, in law, for a note given for the purchase money, where the purchaser is in possession of the land, and a deed has not been refused.

THURSTON, impleaded with COLLINS v. PERKINS, HOPKINS & WHITE.

Where parties enter into articles of co-partnership for a certain period, and thereafter transact business as co-partners, they are to be held and considered as such, so far as the rest of the community is concerned, until the community are duly notified of the dissolution.

Appeal from the Circuit Court of St. Louis county.

The plaintiff in error, Thurston, contends that the court

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1841.

Thurston, im-
pleaded with
Collins,
v.
Perkins, Hop-
kins & White.

below committed error in overruling his motion for a new trial; and in support of this position, makes the following points:

1st. The jury found a verdict against the weight of evidence. On this point refer to the testimony as preserved in the bill of exceptions.

2d. The jury found their verdict against the instructions of the court.

3d. The court below ought to have set aside the judgment and verdict, and granted a new trial to defendant, Thurston, on the ground of newly discovered and material evidence. 2 H. Blk. R. 618; Gowen Partnership, from 248, to 252; Marshall v. Union Ins. Co. 2 Wash. C. C. R. 440; Peters' Digest, vol. 107, 1 Johns. cases, 402.

Bogy & Hunton for Defendants.

The assignment of errors questions the propriety of the decision of the court overruling the motion for a new trial.

In support of that decision we submit the following propositions:

1st. The defendants were partners anterior to the execution of the note sued on, and as such, are jointly liable, unless a dissolution be proven.

2d. Munn had no authority, by virtue of his letter of attorney, to dissolve the partnership. See Story's Agency, pages 62 to 68.

3d. Even if a partnership be dissolved as between the parties, they must give notice, to free themselves from responsibility to others. Watson on Partnership, 385; Starkie on Evidence, 1078.

4th. To entitle a party to a new trial, upon the ground of newly discovered evidence, these facts must appear: that the applicant had been vigilant in preparing his case for trial; that the facts were discovered after the trial, and that they would probably produce a different result; that the evidence discovered will tend to prove facts which were not directly in issue on the trial, or were not known or investigated by proof. Graham on New Trials, 463; 3 J. J. Marshall, 522; 2 J. J. M. 52; Pirtle's Digest, 124 & 125.

5th. The supreme court will not grant a new trial except when the jury clearly erred, and the court refused a new trial. 4 Mo. Rep. 295.

All which is respectfully submitted.

MAY TERM,
1841.

Thurston, im-
pleaded with
Collins,
v.

Perkins, Hop-
kins & White.

Opinion of the Court by Tompkins, Judge.

Perkins, Hopkins & White, brought their action in the circuit court against Charles Collins, and said James C. Thurston, on a note purporting to be made by said Collins & Thurston, to Smith, Salisbury & co., and by them assigned to said Perkins, Hopkins & White. The circuit court gave judgment against said Collins & Thurston; and Thurston now appeals to this court to reverse the judgment of the circuit court against himself.

Thurston had, by a separate plea, denied the execution of the note, which is the foundation of the action.

The plaintiffs in the action first proved the note to be made by Charles Collins, one of the defendants in the circuit court, in the name of Collins & Thurston; and also, that the assignment of the note was in the handwriting of Benjamin P. Smith, one of the firm of Smith, Salisbury & co.

The plaintiffs then read in evidence an instrument of writing to this effect: "This agreement, made and entered into this 22d day of June, A. D. 1839, by and between Charles Collins and James C. Thurston, both of the city of St. Louis and State of Missouri, witnesseth, that said Collins & Thurston have agreed, and hereby do agree, to become copartners together in the wholesale and retail dry goods and domestic commission business, in the city of St. Louis, under the name, firm and style of Collins & Thurston; which said copartnership shall continue for the space of five years from date. And to this end the said Thurston agreed to advance towards the capital of said concern, the sum of two thousand dollars in cash, and to devote his time and active services to the interests and business of said firm. The said Collins agrees to advance towards the capital of said concern the sum of ten thousand dollars, which amount he

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binds himself to pay into the said concern within twelve months from the date of these presents. It was also agreed by and between the said Collins & Thurston, that the said Thurston was to be the active managing member of the said concern; also, that the said Collins & Thurston were to share the profits, and bear the losses, as the case may, &c."

Some time after entering into this partnership, Thurston went to New York, from which place he wrote to Collins that he could not buy goods on any terms whatever; that Collins' friends were willing to do any thing and every thing for them both, they could do consistently under the present circumstances. But in consequence of some of his paper being protested there some time before, it all proved of no effect. Thurston further wrote that, after learning how the matter stood, he consulted both Collins' friends and his own, and they "*advised him by all means to give it up.*"

He also recommended to Collins a dissolution of partnership; and to that end sent on two instruments of writing executed by himself, which he desired Collins also to execute. This letter of Thurston was dated 7th August, 1839. The instruments of writing sent as above mentioned by Thurston, were signed Charles Collins, by an attorney in fact, acting under a very comprehensive power from Collins. He notified Thurston, but not Collins of his act. No publication was made, either of the commencement or the dissolution of the partnership.

Thurston moved for a new trial, because the verdict of the jury was against evidence; and he had discovered new and material evidence, and had by extraordinary and unexpected events, been detained from attending to the trial of the cause. The new evidence is, that he can prove by one Benjamin P. Smith, one of the payees of the note sued on, that at the time he was in the city of New York, in the summer of 1839, whither he had gone to purchase goods for the firm of Collins and Thurston, and after he had abandoned the idea of purchasing goods for and on account of said firm, and after he had written to St. Louis that the articles of copartnership might be annulled, that he was introduced by said Smith to said plaintiffs, but that he not only did not

offer to purchase goods from them for and on account of said Collins & Thurston, but that he did not inform them even that such a firm had ever been formed or contemplated; that he could also prove by said Smith, that he, said Smith, had informed said Collins of the annulling of the said articles of co-partnership between him and the affiant, three or four weeks before any purchases were made by said Collins on account of the firm of Collins & Thurston.

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That Collins should, when he went to New York to purchase the goods, which were the consideration of the note here sued on, leave behind him in the hands of an agent, a power of attorney of so extensive a character as to enable that agent to make void any act he, Collins, might do during that absence, seems so extraordinary an act, that, even if the power had been declared in express terms, we might with good reason suspect such act to be tainted with fraud. As then he did not express in clear terms his intention to give this agent so extensive a power, it is but charitable to suppose that he never intended to give him such a strange power. But even if it could be inferred that Collins did honestly confer on his attorney in fact such power, and that this attorney did in his own person notify Collins of his act before the execution of this note, it would amount to this only, that Thurston, the plaintiff in error, had entered into a partnership with Collins, of which, although notice had not been given in the newspapers, yet we are at liberty to believe that the notice of such partnership might have been extensively circulated by the numerous friends who generally assist in such business. Certain it is, that Thurston himself tells us that he had himself communicated in New York the information of this partnership, so far as to find that he could not purchase goods on its credit. Both his friends and those of Collins had been informed of its existence, for he says they advised him by all means "*to give it up.*"

But it is an admitted fact, that Collins and Thurston had entered into articles of agreement to become partners for five years from the day of the date. The world is not, then, to look into their affairs to see whether they did actually

Where parties enter into articles of co-partnership for a certain period, and thereafter transact business as co-partners, they are to be held and considered as such, so far as the rest of the community is concerned.

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trade, in order to consummate such partnership, but they are to be held and considered as such from the date, so far as the rest of the community is concerned, until this community is duly notified that they have dissolved it.

The evidence, then, appears to have been sufficient to justify the jury in finding the verdict on which the court entered up the judgment; and even if the appellant, Thurston, could prove all that he expects to prove, on a new trial, the jury ought, in my opinion, to find against him.

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community
are duly noti-
fied of the
dissolution.

The judgment of the circuit court is therefore affirmed.

PAPIN V. HOWARD.

While the act of Feb. 12, 1839, respecting appeals from Justices' Courts, was in force, no other person than the party aggrieved could make the affidavit—it could not be made by an agent.

Appeal from the St. Louis Court of Common Pleas.

Manning for Appellant.

The only question in this case is, whether an affidavit for an appeal from a justices' court, can be legally made by *any other person*, than the one aggrieved; or in other words, can an affidavit for such an appeal be made by an agent?

The appellant holds the affirmative; and offers the following reasons:

1st. The maxim *qui facit per alium facit per se*, applies with equal justice to remedial proceedings; and the saying, *qui facere potest per se, potest facere per alium*, though not an axiom, may be invoked with earnestness in the attainment of redress for grievances at law. The legislature so esteemed them.

Vide Attachment Law of 1835, Rev. Law. p. 76, sec. 2d;

“ “ “ 1839, p.

“ Practice at Law, Rev. Law. of 1835, p. 470, sec. 8-9.

2d. Remedial statutes are to receive an equitable inter-

pretation, and may sometimes be enlarged to prevent a failure of remedy; for *qui hæret in litera hæret in cortice*. 1 Kent. Com. p. 465.

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3d. The statutes of 1835 & '39, relating to appeals from justices' courts, being remedial, should have a liberal construction, and be construed *in pari materia*. Stat. '39, page —; 1 Kent Com. p. 463; Rev. Law. '35, p. 369, art. 8.

4th. As the last of these statutes is supplementary to the first, they should be construed as if passed at the same time and by the same act. 1 Kent Com. p. 462 & 463-4; Rev. Law of 1835, p. 369, art. 8, sec. 1 & 3; Statutes of '39 p.—.

5th. If such construction as is invited by the two last propositions, be not followed, contradiction and absurdity, if not injustice, will ensue; for, 1st, If an agent is authorised to take an *appeal*, and an appeal *cannot* be taken *without* an *affidavit*, and the *agent* cannot be suffered to make the affidavit, then the agent is authorised by the first section of the act to do that which another section forbids. Rev. Law '35, p. 369, art. 8, sec. 1 & 3; and idem of '39, p. —. Again, 2dly, If by the 1st section of the act of 1835, an agent is authorised to take an *appeal*, he is *licensed* to do an act which is not complete without its concurrent, and yet if he does perform the concurrent he vitiates the whole!

6th. Whenever a power is given by statute, every thing necessary to the making of it effectual or requisite to attain the end is implied. 1 Kent. Com. 464; vide idem Stat.

7th. The word "agent" used in the Statutes of 1835, had not the technical character within the meaning of the legislature, but is synonymous to "some other person." Vide Rev. Law 1835, page 369, art. 8, and secs. 1 & 3; Stat. '40, p. 102, sec. 4.

8th. The Statute of 1840, comes in time to aid the appellant's construction of the former Statutes of 1835 & '39; if in fact it does not solve doubts peremptorily. Vide Law of '40, p. 102, sec. 4.

9th. The construction of the act of 1840, as having reference to cases then in court, and before commenced.

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would not make it of an retrospective character, since it would operate only on proceedings to take place after its passage.

Darby & Knox for Appellees.

1st. An agent could not legally take an appeal from the justice. See Laws of Mo. of 1839, p. 78, sec. 1. The law above referred to was passed to prevent vexatious appeals, which had become common, and for this purpose required the party to purge his own conscience before an appeal would be allowed.

That the object of the legislature was to compel the principal, in person, to take the appeal, and not enable an agent to do it for his principal, appears not only from the above statute, but from the same book, page 47, sec. 14, article. Forcible Entry & Detainer; when both the principal and agent are both authorised to take an appeal; so also in Rev. Statutes, page 369, sec. 1st.

If, then, the agent had no right to take the appeal, then the court of common pleas did not err in dismissing the appeal, or in overruling the motion to reinstate the appeal.

Opinion of the Court by Napton, Judge.

The appellee sued Papin before a justice of the peace upon an account. The service of the writ was by leaving a copy with a white person of defendant's family above the age of fifteen years. Judgment was rendered by the justice for the plaintiff. An affidavit for an appeal was made by an agent of the defendant, in the usual form, and bond given. When the case came up in the court of common pleas, the appellee moved to dismiss it, because the affidavit for an appeal was not made by the appellant in proper person, but by another, which motion was sustained.

This suit before the justice was instituted in August, 1840; the appeal taken in September of same year. The proceedings are consequently regulated by the act '39.

That act is entitled "An act supplementary to an act entitled an act to establish justices' courts, and regulate proceedings therein," approved March 21, 1835, and provides that,

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"Any person aggrieved by any judgment rendered by a justice of the peace shall, before an appeal shall be allowed, make affidavit before the justice before whom such trial is had, that he does not take such appeal for the purpose of vexation or delay, but because he considers himself aggrieved by the judgment of the justice."

This act seems to be unequivocal in its terms, and cannot, I think, admit of but one interpretation. It is true that the act of 1835, to which it was supplementary, allowed appeals to be taken by the party, or some one for him, and required no affidavit; yet this last act which allows an appeal only in case of an affidavit made, must be regarded as repealing so much of the former act as is inconsistent with this provision. The legislature obviously designed that the party aggrieved should purge his conscience; and both the language and spirit of the act forbid the idea that any other than the party aggrieved could make the necessary affidavit.

The act passed at the last session of the legislature, virtually repeals the law of '39, and places the matter as it stood under the act of 1835. Nothing can be inferred from this last act that it was declaratory of the law in force at the time of its passage, but I should rather suppose it was designed to remedy the evils, or supposed evils, of the act of 1839.

While the act of Feb. 12, 1839, respecting appeals from justices' courts, was in force, no other person than the party aggrieved could make the affidavit—it could not be made by an agent.

The judgment of the circuit court is affirmed.

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1841.

O'BRIEN V. UNION FIRE COMPANY OF ST. LOUIS.

O'Brien
v.
Union Fire
Company.

Suits for the recovery of fines imposed for breaches of the by-laws of a private corporation, may be brought before justices of the peace, when the amount sued for is within their jurisdiction.

Appeal from the Circuit Court of St. Louis county, and thence transferred from the Court of Common Pleas.

Manning for Appellant.

1. A justice of the peace has no jurisdiction in cases of breaches of a by-law passed by a *private* corporation, unless the law incorporating the same, *expressly* confer such jurisdiction.

2. That if there were no original jurisdiction in the justice of the peace, neither the circuit or common pleas could obtain jurisdiction over the case by the appeal.

3. That a want of jurisdiction over the subject matter may be set up under the general issue, or against a judgment or other proceeding of the case. 3 Mass. Rep. 124; Doug. 650, n. 132; 6 East. 583; 1 East. 352: vide cases cited in Chitty on Pleading, p. 476-7; 9 Cowen, 227; Rev. Laws, 1835, p. 348, secs. 2 and 5; Charter, art. —, sec. 1; Charter, sec. 5, p. —; By-law, secs. 8 and 9, p. —; refer to charter of St. Louis, 1835, sec. 32, p. 60; Ordinances, p. 201; 5 Cowen, 538; Rev. Laws, 1835, "Justices' Court, p. 348, secs. 2, 3, and 5; Charter, sec. 2; Charter of St. Louis, 1835, sec. 30 :

" " 1839,

" " 1840.

Polk & Callahan for Appellee.

The defendant below brings the case here, alleging that the action of the court of common pleas, in that behalf, involves error:

1. Because it was ill-timed, out of place, and inadequate to avert the effects of the encroachment of jurisdiction (if any) by the justice of the peace. 1 Chit. Plead. 478-9; 3 Blk. Com. 111; 11 Johns. Rep. 444.

2. Because it was incompetent for the court of common

pleas (or circuit court) to *dismiss an appeal*, regularly effected, from a justice of the peace, because of an encroachment of jurisdiction; particularly upon a mere motion *by the appellee therein*, made after the appeal shall have been taken. Mo. Rev. Stat. 1835, 370; "Ins. Co." art. 8, sec. 8 and 17; 5 Mo. Rep. 124 and 533; 4 Bibb, 416.

3. Because the case was properly cognizable before the justice of the peace. Mo. Rev. Stat. 1835, 340; "Ins. Co." art. 1, sec. 1; 1st and 2d par. of sec. 2, and also sec. 5; Ang. on Cor. 207, c. 10, s. 1, and 376, c. 17; 7 John. Rep. 357; Mo. Stat. Dec. Ses. 1836, 172, "Union Fire Co." and p. 171, sec. 1, "Cen. Fire Co."

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1841.

O'Brien
v.
Union Fire
Company.

Opinion of the Court by Tompkins, Judge.

The fire company sued O'Brien before a justice of the peace and obtained judgment against him.

An appeal was taken to the circuit court where judgment being again given against him, O'Brien appeals to this court.

The demand of the fire company consisted of fines imposed on O'Brien, a member of said company, for breaches of its by-laws. It is admitted that the corporation had a right to make its own by-laws and to impose fines for the breach of such laws. But the jurisdiction of the justice of the peace is denied. Jurisdiction is given to justices of the peace in actions of debt, covenant, and assumpsit, and all other actions founded upon contract, &c. Vide section 2, art. 1st, of the act to establish justices' courts, p. 348 of the digest of 1835. The appellant, O'Brien, by becoming a member of that company impliedly assented or contracted to pay fines imposed on him under the authority of its by-laws. The judgment, then, of the court of common pleas ought in my opinion to be affirmed, and it accordingly is affirmed.

Suits for the recovery of fines imposed for breaches of the by-laws of a private corporation, may be brought before justices of the peace, when the amount sued for is within their jurisdiction.

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1841.

WARNE V. HILL.

Warne
v.
Hill.

1. Petition in debt may be maintained by the holder of a negotiable promissory note, within the meaning of the 6th sec. of the act concerning "bonds and notes," (R. C. 1835, p. 105,) against the maker thereof.
2. The 7th section of the above act applies not to the form of action to be used by the holder of such a note, but was intended to give the holder the same remedy against the maker and endorser respectively, as in cases of inland bills of exchange.

Appeal from the St. Louis Circuit Court.

Hudson for Appellee.

The counsel for the appellee insists that the court below committed no error in overruling the demurrer and giving judgment for the plaintiff, and relies on the statute of this State as sufficient authority on this subject. See Revised Code, page 449 and 383.

Opinion of the Court by Tompkins, Judge.

Hill sued Warne in the circuit court by petition in debt. That court gave judgment for Hill, and to reverse it this appeal is prosecuted.

It is contended that the note sued on here, is not such an instrument in writing as by the law introducing this action was intended to be sued on in this form of action. The act provides that any person being the legal owner of any bond or note, for the direct payment of money or property, may sue thereon in any circuit court having jurisdiction thereof, by petition in debt. Page 447 of digest 1835. The note here sued on reads thus: "Sixty days after date I promise to pay to the order of J. B. Hill, negotiable and payable at the St. Louis Insurance Office, in St. Louis, Mo., two hundred and twenty-five dollars, without defalcation or discount, for value received." It is contended that this description of note is withdrawn from the operation of the statute giving the action of petition in debt, by the construction of the 6th and 7th sections of the act concerning bonds and notes, p. 105

of the digest of 1835. The said sixth section provides that every note for the payment of money, expressed on the face thereof to be for value received, negotiable and payable without defalcation, shall be due and payable as therein expressed, and shall have the same effect, and be negotiable in like manner as inland bills of exchange. By the seventh section it is provided that the payees and endorsees of every negotiable note payable to them or order, and the holder of every such note, payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and endorsers thereof respectively, in like manner as in cases of an inland bill of exchange, and not otherwise. It is contended that by this provision, the holder of a promissory note would be required to sue in the same form of action as the holder of an inland bill of exchange; that is to say, in an action of assumpsit. Because, by the first section of the act giving the action by petition in debt, that action lies only on a bond or note for the direct payment of money. The sounder opinion seems to be, that the seventh section applies not to the form of action to be used by the holder of a negotiable promissory note, but that he may maintain an action for the sum of money therein mentioned, both against the maker and indorser respectively, and recover against them such damages as such holder could recover against the drawer or indorser of an inland bill of exchange. After the declaration made in the sixth section, that the notes expressed on the face thereof to be for value received, negotiable and payable without defalcation, should be due and payable as therein expressed, and should have the same effect, and be negotiable in like manner as inland bills of exchange, the act might have been thought defective, had it not been also provided that the holder might recover against the maker and the several endorsers as in cases of inland bills of exchange. But if the holder wished to proceed against the maker of a negotiable promissory note, there is no reason why the lawgiver should deny him the right of using the more speedy action of petition in debt. The letter and spirit of the first section of the act for the speedy recovery of debts due on bonds and notes, gives the holder of the negotiable note the

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1841.

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v.
Hill.

Petition in debt may be maintained by the holder of a negotiable promissory note, within the meaning of the 6th section of the act concerning bonds and notes, (R. C., 1835, p. 105.) against the maker thereof.

The seventh section of the above act applies not to the form of action to be used by the holder of such a note, but

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v.
Hill.

was intended to give the holder the same remedy against the maker and endorser respectively, as in cases of inland bills of exchange.

right to use this action against the maker of such note, and there is no good reason to be assigned why it should be taken away by the seventh section of the act concerning bonds and notes above cited. It is a more reasonable conclusion the legislature by the words used in the seventh section intended only to give holders of negotiable notes such redress against the makers and endorsers thereof as was given against the drawers and indorsers of inland bills of exchange, leaving such holders to choose their own form of action, whether given by the statute or the common law. The judgment of the circuit court is therefore affirmed.

J. & W. FINNEY V. SHIRLEY & HOFFMAN.

An acknowledgment of indebtedness, in writing, in a specific sum, and for a valuable consideration, raises a promise to pay, and is in law a note.

Appeal from the St. Louis Circuit Court.

Opinion of the Court by Napton Judge.

This was an action brought before a justice of the peace of St. Louis, upon the following instrument; "Due Shirley and Hoffman, the sum of one hundred and forty-two dollars, — cents, the am't. of two meat bills, rendered. \$142. Portland, Nov. 3, 1838. Thomas F. Coburn, Clk. for steamboat Bee and owners."

Judgment was given for the plaintiffs, and defendant appealed to the circuit court, and judgment having been again for plaintiffs, a motion for a new trial was made, and overruled, and the case brought here by appeal.

The only question appears to be on the jurisdiction of the justice. If the obligation above recited be a *note*, the justice had jurisdiction; if not, the case was improperly entertained in the circuit court. An acknowledgment of indebtedness, in writing, in

edness, in a specific sum, for a valuable consideration, raises a promise to pay. The instrument here sued on was therefore a note within the meaning of our act. The cases cited contain instruments precisely like the present, in which the courts have held them to be notes. 10 Wend. 677; 2 Cowen, 536.

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Hoffman.

The judgment of the circuit court is therefore affirmed. a specific sum
valuable consideration, raises a promise to pay, and is in law a note. and for a va-

TIERNAN, Appellant, v. JOHNSON, et als., Appellees.

Ejectment: Defendant held the premises in question under a lease for eight years, not yet expired, made by the guardian of the plaintiffs' wives, under the direction of the county court, before their intermarriage with plaintiffs. After the expiration of the guardianship and before the expiration of the lease, plaintiffs had accepted rent from defendant. Held, that whether the lease was voidable or void, the acceptance of rent by the parties, after the expiration of the guardianship, raised an implied tenancy from year to year, which required notice to quit.

Appeal from the St. Louis Circuit Court.

Hudson for Appellant.

1. That the circuit court erred in refusing to give the instructions asked by the counsel for the defendant, because it is clear from the testimony in the cause that there existed a tenancy: that the appellant was to all intents and purposes a tenant; that his tenancy had been recognised by William Dalmore, one of the appellees, by the acceptance of rents, and the doing of other acts which showed that Dalmore considered and treated Tiernan as a tenant. That the lease and receipts offered in evidence by the defendant in the court below, establishes the existence of a tenancy. It was therefore necessary for the plaintiffs to prove a notice to quit before they could maintain this action, and the court below should have given the instructions asked for. See Cruise Dig. 261; 4 Cruise Dig. 73; Woodfall's Landlord and Tenant, 163; 1 Wheaton, 576-77; also 4 Kent's Com. 112.

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1841.

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v
Johnson.

2. The verdict is against the law and the evidence. The plaintiffs below having failed to establish a notice to quit before bringing the action, and also failed to show a sufficient title to the premises in dispute, it appearing from the evidence that there were others equally interested in the title to the said premises and should have been joined in the action.

3. The damages are excessive and against or without any evidence to justify the verdict and finding, there being no testimony as to the value of the premises in dispute, the damages, if any, ought to have been given from the testimony should have been nominal.

4. The court erred in refusing to grant a new trial for the reasons filed below, and upon the evidence given on the trial of the cause. The question as to the necessity of a notice to quit, in cases like the present, has been so often and so clearly settled that the counsel deems it unnecessary to refer the court to the numerous authorities on this point.

————— *for Appellees.*

The questions raised in this cause are.

Does the lease given in evidence create the relation of landlord and tenant between the parties to this action, and produce the necessity of a notice to quit, before the commencement of the action of ejectment?

Whether the guardian had power under the laws of Missouri to lease the premises of his ward for a longer time than one year at a time?

Whether such guardian could make such lease without an order of the county court?

Revised Code of 1825, p. 416; act of 8th Feb. 1825, sections 1, 6, and 7; Rev. Code of 1835, p. 295, sections 8 and 9; 7 Mass. Rep. p. 6; 2 Wilon. 129, 135; 10 Johns. Rep. 438; 1 Brockenbrough, 361; 2 Kent's Comment. 224, 228 note 6.

Opinion of the Court by Tompkins, Judge.

This was an action of ejectment brought by the appellee

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against the appellant. The circuit court gave judgment for the appellees, and to reverse that judgment this appeal is prosecuted.

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On the trial of the cause the plaintiffs proved a title derived from Antoine Dutromble, having married daughters of said Dutromble. As evidence of his title the defendant, appellant here, produced a lease for eight years, made by the guardian of the heirs of said Dutromble, commencing on the 17th May, 1834, made by and with the consent of the county court of St. Louis county, of the said premises herein sued for. The statute of the land does not positively direct how the land of minors is to be leased. Guardians under our statute must necessarily have that power. But often no man would take the land for a single year, where repairs are wanting which would amount to more than one year's rent. The lease was made under the direction of the county court; and we are disposed to believe it valid. If indeed there has been any improper or fraudulent conduct on the part of the guardian, the plaintiffs have their action against him. At most, even if the lease were void, the defendants, appellants, have not participated in any fraudulent conduct of the guardian, and ought to be regarded as tenants from year to year, they having proved payment of rents from year to year, accepted by the guardians after the determination of the guardianship. But it is not pretended to be proved that there was any misconduct on the part of the guardian, and the lease under which the defendants claim appearing to be made under the direction of the county court, we presume it to be a good lease.

The circuit court ought then to have granted, on the defendant's motion, a new trial. Because, then, that court did not grant such new trial, its judgment is reversed, and the cause is remanded to be further proceeded in conformably to this opinion.

Napton, Judge.

I concur in reversing the judgment, upon the ground that whether the lease was voidable or void, the acceptance of

Ejectment
Defendant held the premises in question under a lease for eight years, not yet expired, made by the guardian of plaintiffs' wives, under the direction of the county court, before their intermarriage with the plaintiffs. After the expiration of the guardianship, and before the expiration of the lease, plaintiffs had

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v.
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rent by the parties after the expiration of the guardianship, raised an implied tenancy from year to year, which required notice to quit.

Tompkins, Judge.

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the lease was voidable or void, the acceptance of rent by the parties, after the expiration of the guardianship, raised an implied tenancy from year to year, which required notice to quit.

I concur in the amendment of this opinion by Judge Napton.

WARNE V. ANDERSON & THOMPSON.

1. A variance between the declaration and the instrument sued on, in the date of the latter, is cured by verdict. After verdict the presumption is that the proof corresponded with the averment in the declaration.
2. In an action against the acceptor of a bill of exchange, it is not necessary to prove his hand-writing, unless it is denied by plea verified by affidavit.

Appeal from the St. Louis Circuit Court.

J. B. King for Appellant.

The judge of said St. Louis circuit court erred in permitting the said appellees by their counsel to amend their declaration, and then gave judgment for them without continuing said cause at the said trial thereof, when said amendment was made.

The circuit court erred in not granting a new trial to the appellant, when moved so to do for the reasons filed; and then permitted the appellees to again amend their declaration by their counsel, to avoid the operation of the variance apparent on the face of the declaration.

The circuit court erred in giving judgment for the appellees, as there was no proof that the appellant had accepted said bill of exchange in writing, signed by himself or his lawful agent. See Mo. Digest, page 97, on the subject of Bills of Exchange, sec. 1.

THIRD JUDICIAL DISTRICT.

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T. B. Hudson for Appellees.

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1841.

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v.
Anderson &
Thompson.

1st. That the amendment made on the trial of the cause below, was of an immaterial allegation, and might have been stricken out of the declaration as surplusage.

2d. That if the supposed variance was material, the defendant below should have taken advantage of the variance in a different manner, and it was too late to insist upon a formal objection after the plea of the general issue.

3d. That the defendants made no objection to the offering in evidence the bill of exchange on the trial in the circuit court, and after it was offered and read, it was too late to urge any objection to the same on the ground of variance.

4th. The bill of exchange was accepted in writing, and signed by the defendant below; this is sufficient evidence of the acceptance, and will bind the acceptor unless he deny the same on oath. The counsel for appellees insist that it is not necessary in an action against an acceptor, to prove the acceptor's hand writing, unless the same be denied on oath: and according to the Statute of Missouri, there is an express provision that all instruments purporting to be signed by any person to be bound thereby, shall be taken to be signed by such person, until such signature be denied on oath. See Revised Code, 463.

5th. In this case there is an acceptance in writing signed by the party, in accordance with the provisions of the Statute on the subject of Bills of Exchange. See the bill of exchange set out in the bill of exceptions. Rev. Code, 97.

6th. The courts of this state have a right to amend any writ or proceeding in any cause, either in form or substance, upon such terms as the courts may think proper for the furtherance of justice. In the present case the court suffered the amendment, and in doing which committed no error. See Revised Code, p. 467.

7th. After judgment rendered, the court may suffer any imperfections or defects in matters of form to be amended. Such was the case in this cause. See Revised Code, 468, sec. 4.

8th. No judgment will be arrested on account of any va-

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v.
Anderson &
Thompson

riance in the pleadings, the names of parties, the description of instruments, &c., where the same is matter of form, or where the matter has been once correctly set out. See Rev. Code, 468, sec. 7.

Opinion of the Court by Napton, Judge.

The appellees sued the appellant in assumpsit on a bill of exchange. Plea non-assumpsit, and verdict and judgment for plaintiffs below. The appellant moved for a new trial, because the verdict was against law and evidence, and because the court erred in suffering the plaintiffs below to amend their declaration, and overruled the defendant's motion for a continuance, by virtue of said amendment. It was also alleged as a reason for a new trial, that the court suffered improper evidence to be given on the trial. The motion for a new trial was overruled.

It appears from the bill of exceptions, that upon the trial, the plaintiffs, below, offered in evidence a bill of exchange, which is set forth in the record, and upon the back of which is indorsed the words, "accepted, St. Louis, June 22, 1840. Thomas S. Warne." The plaintiffs proved the hand-writing of the payees, and who composed the firm of Anderson and Thompson. And this was all the testimony. The defendant, below, then moved the court for a non-suit, upon the ground that the proof did not sustain the plaintiff's declaration, in this; the declaration read, "George C. Anderson & John S. Thompson plaintiffs, co-partners in trade, under the name, firm and style of Anderson & Thomas." This was the only variance alleged on the trial, and the court overruled the motion, and allowed the counsel of appellees to amend the declaration by striking out the word "Thomas," and inserting "Thompson," and without granting any continuance by reason of said amendment, the court proceeded to give judgment. The appellant then moved for a new trial, as before stated.

Upon this motion for a new trial, it seems from the bill of exceptions, that a variance between the declaration and the

bill of exchange offered in evidence, was brought to the notice of the court, as one ground for granting a new trial. The court overruled the motion, and suffered the declaration to be amended *nunc pro tunc*, by inserting 22d June instead of 2d June, as it was in the original declaration. To all of which the appellant excepted.

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v.
Anderson &
Thompson.

The errors assigned are,

First, That the court improperly allowed the declaration to be amended, and if properly allowed, the defendant was entitled to his continuance.

Second, The court erred in allowing the declaration to be amended after judgment.

Third, The verdict was unsupported by the testimony.

Our statute regulating practice at law, provides, (Rev. Co. of '35, p. 467,) that the court in which any action shall be pending, shall have power to amend any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before final judgment rendered therein. If such amendment be made in matter of substance, the adverse party shall be allowed an opportunity, according to the course and practice of the court, to answer the pleading so amended.

There is no doubt that the court under this section had the power to allow the amendment; and the only question is, whether the defendant had a right to a continuance because of such amendment. Was the amendment formal or substantial? If the allegation, that the plaintiffs were co-partners under the name and style of Anderson & Thompson, be a material allegation, the amendment must be one of substance. I am of opinion, that this allegation was material, and the plaintiffs so consider it by introducing proof of the partnership. If the partnership proved was essentially different from the one set out in the declaration, the plaintiffs must of course have been non-suited, and to avoid this they were suffered to make the amendment. It has been often decided by the court, that such amendments entitle the other party to a continuance. It may be a mere clerical error, made by counsel; but whether so or not, if it

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A variance between the declaration & the instrument sued on, in the date of the latter, is cured by verdict. After the presumption is, that the proof corresponded with the averments in the declaration. In an action against the acceptor of a bill of exchange, it is not necessary to prove his hand-writing, unless it is denied by plea verified by affidavit.

require amendment, and the amendment is of a material allegation, and one which must be proved as averred, the statute is imperative in giving a continuance.

The amendment made by the court after judgment, was in my opinion, entirely unnecessary. The verdict cured the declaration, if it was deficient in the particular suggested; and after judgment, the presumption was, that the proof corresponded with the averments. There was no error on this point.

The last objection taken, that the verdict was unsupported by the testimony, appears to be without foundation. Proof of the signature of the endorsers, and the partnership of endorsees was made, and the only objection taken is the failure to prove the proper hand-writing of the acceptor, who was the defendant. Our statute provides, that before any proof is requisite to establish the hand-writing of the party charged, he must deny the instrument to be his. No such denial was in this case made.

My opinion is, that this judgment should be reversed, because the court refused to grant a continuance.

Tompkins, Judge.

I concur in the opinion except on the first point. The judgment is then affirmed by a division in this court.

BLOUNT & BAKER V. WINRIGHT.

The act giving the action for a forcible detainer, contemplates a case in which the plaintiff has been in lawful possession, and in which the defendant, or those under whom he claims, have peaceably obtained that possession, and held over after a demand made in writing.

Appeal from the Court of Common Pleas of the county of St. Louis.

Opinion of the Court by Tompkins, Judge.

Blount and Baker brought their action of forcible detainer

against Winright, before a justice of the peace, and obtained a judgment, from which Winright appealed to the court of common pleas. In that court judgment was again given against Winright. The court of common pleas then, on motion of Winright, dismissed the cause from the docket. The plaintiffs appealed to this court.

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Blount & Baker v.
Winright.

The facts of the case are as follows: The appellants, plaintiffs below, claimed possession of the premises in dispute by virtue of a deed made to them by certain persons to whom the disputed property had been conveyed in trust, to secure the payment of a certain debt, for which Winright had made and delivered his promissory note. Winright failing to pay this money when it became due, the trustees sold the land, and the appellants became the purchasers, and received from the trustees the deed under which they claim.

The question to be decided is this: had the justice of the peace jurisdiction of the cause, such being the facts on which the plaintiff's claim is founded?

The plaintiffs, to reverse the judgment of the court of common pleas, rely on the third section of the act concerning forcible entries and detainers, p. 278, of the digest of 1835, which reads thus: "When any person shall wilfully, and without force, hold over lands, tenements or hereditaments, or other possessions, after the termination of the time for which they were let to him, or the person under whom he claims, or shall *lawfully* and peaceably obtain possession, but shall hold over the same unlawfully and by force," &c.

The plaintiffs in this cause have sufficiently shown that Winright did not obtain possession of the premises either from themselves or from the makers of the deed under which they claim; on the contrary, the history of this cause shows him first in the lawful possession of the premises, and by his deed of trust agreeing to be dispossessed, should he not on a given day pay a certain sum of money. Whether Winright paid this money, or whether, if he did not pay it, the payee of the note prevented him from paying, and thereby excused him, are not questions to be decided by a justice of the peace. The act giving this action for a forcible de-

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tainer, contemplates a case in which the plaintiff has once been in lawful possession, and in which defendant, or those under whom he claims, have peaceably obtained that possession, and hold over after a demand made in writing. The court of common pleas, then, committed no error in dismissing the cause: for the justice having at first no jurisdiction, none could be communicated to the higher court by the appeal.

The judgment is therefore affirmed.

The judgment is therefore affirmed. The judgment is therefore affirmed. The judgment is therefore affirmed.

WEISENECKER v. KEPLER, STINE & SMITH, interpleaders.

An appeal lies from the judgment of a justice of the peace, on an issue found between the plaintiff, in attachment, and an interpleader, before the final determination of the cause between the plaintiff and defendant.

Appeal from the Circuit Court of St. Louis county.

Bowlin for Appellant.

An appeal from a justice can only be entertained upon a final judgment in the cause. See article 8, sec. 1, and following, regulating Justices; Revised Code, 369. Upon an appeal granted from a justice, *all* the papers in the cause must be sent up, before the circuit court is possessed of the cause. See R. Code, page 370, sections 7 & 8.

King and Tunstall for Appellees.

The circuit court in this case committed no error in overruling said motion to arrest said judgment.

1st. Because the Statute of Missouri, (see Missouri Digest, page 369, 1st section,) provides that any person aggrieved by any judgment rendered by a justice of the peace, may make an appeal, &c.

2d. Because the issue tried, and upon which Weisenecker

the appellee, took his appeal, which from the law he clearly had a right to do, was simply whose property was attached?

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3d. The Statute of Missouri, in giving this remedy upon interpleader, intended to avoid circuitry of action, by allowing a man when his property is attached, instead of bringing a separate action for the same, to come in and file his plea of interpleader, which places him in the attitude of plaintiff, and if he can show the property to be his, it is released from the attachment.

Weisenecker
v.
Kepler.

Opinion of the Court by Tompkins, Judge.

From the record of this case it is difficult, perhaps impossible, to make out any plain history thereof: but the following seems to be agreed on by the counsel of each party: Weisenecker instituted a suit against Kepler by attachment, and took possession, under the authority of the writ of attachment, of certain property. Stine & Smith interpleaded, claiming the property attached. Issue was joined, and the cause submitted to a jury upon evidence; the jury found for the interpleaders Stine & Smith. The justice of the peace before whom the cause was pending, gave judgment accordingly, and Weisenecker appealed to the circuit court. There the jury found the property attached to be the property of Kepler, the defendant in the action instituted by Weisenecker: that is to say, they found against the claim of Stine & Smith, the interpleaders. Kepler, the defendant in the action, does not appear to have been found by the officer.

Stine & Smith, interpleaders, then moved in arrest of judgment, assigning for reason,

1st. Because there is no cause of action shown by the papers in the cause.

2d. Because the justice granted the appeal upon a collateral branch of the case.

The record of this case as sent up from the circuit court, begins thus:

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1841.Weisenecker
v
Kepler.Peter Weisenecker,
vs.

William Kepler.

Assumpsit on account of \$32 62
Attachment returned, Oct. 10th,
1838. Executed by attaching

the property, &c., and defendant not found, and on this 20th day of October, 1838, the plaintiff is ordered to cause notice to be set up according to law, notifying the defendant to appear and plead to the action at the next law day of the justice, &c., and now on this thirtieth day of October, 1838, Nicholas Stine & Nicholas Smith come before the justice and asked leave to interplead, saying the property is theirs, &c. Then follows the plea and process to bring in a jury to try the right of property, their verdict, &c. But there is found in the record no account of the commencement of the action by Weisenecker. This is wrong. It ought to have appeared on the transcript sent up by the justice to the circuit court, that a suit was regularly commenced by Weisenecker against Kepler, and that it was by attachment; for this purpose a copy of the summons, attachment, and whatever proceedings were there had might have been transcribed, to show that the interpleaders, Stine & Smith, were before the justice, conformably to the provisions of the statute. The objection of the counsel of Stine & Smith, the interpleaders, that the appeal was granted upon a collateral branch of the case, and before any final judgment in the principal cause, seems to be without foundation. For the judgment was final as to the claim of the interpleaders, and divested them of the contested property, and therefore it was but just that the interpleaders should have their appeal instantly. But because the appellant did not, by the transcript by him brought up from the justices' court, show a case of a suit regularly commenced by Weisenecker against Kepler, in which the appellants, Stine & Smith, were interpleaders, the judgment of the circuit court ought, in my opinion, to be reversed, and it is accordingly reversed.

An appeal lies from the judgment of a justice of the peace, on an issue found between the plaintiff, in attachment, and an interpleader, before the final determination of the cause, between plaintiff and defendant.

LORTON V. THE STATE.

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The stealing of several articles of property, at the same time and place, constitutes but one offence, and the circumstance of several ownerships of the property cannot increase or mitigate the nature of the offence.

Lorton
v.
The State.

Appeal from the St. Louis Criminal Court.

T. T. Gantt for Appellant.

1st. That the stealing of goods at *different* times, of the value of 4d, 6d, and 3d, was punishable at common law as grand larceny. 1 Hawk. Pc. ch. 33, sec. 33. That if this severity was seldom practiced, it was because of the rigor of such proceeding. Ibid. That consolidation was a favorite principle of common law, both in civil and criminal cases, and that in the latter it was always adhered to, when unopposed by considerations of humanity. Id.—ibid.

2d. That if the goods of several persons are stolen at the *same* time, the circumstance of different ownerships, does not change the offence, in contemplation either of law or morality; and that if there be but one transaction, there should be but one indictment, there being but one felony, every branch of which was punishable by one prosecution, one indictment, and one sentence. 3 Chitty's Crim. Law, 960; 4 Carrington & Payne, 386, Rex v. Birdseye.

3d. That a former conviction and sentence is a bar to a subsequent prosecution for the same felony. 1 Chitty's Criminal Law, 462, 463.

4th. That unless the court is prepared to say that the stealing of several different articles from the same person at the same time can be made the subject of several indictments, the proposition that the circumstance of several ownerships does not entitle the prosecutor to change so entirely the duration and extent of the punishment would seem to rest upon principles of policy and justice, and to be resisted by no considerations of general or particular mischief.

5th. That the enlarged discretion which the doctrine contended for and adjudged below would rest in the prosecutor, would inflict upon the prisoner a punishment graded

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Lorton
v.
The State.

rather to his caprice and power, than by the fixed provisions of law. That such enlargement is contrary to the spirit of our laws and institutions in every case, but above all in criminal proceedings.

Bent, Circuit Attorney, for the State.

That larceny of goods of several owners, taken at the same time, may be joined, is not denied; and that when the goods of several are mixed together, as a number of files laying in the corner of the shop, belonging to different persons, they cannot be severed, is true. But when two persons are sleeping in one room in a Hotel, their clothes laying on separate chairs, the thief or thieves enter and take the clothes of both, the larceny of the clothes of each, it is believed, constitute separate offences, and may be indicted separately. This last was the situation of the clothes taken and for which Lorton was indicted.

Opinion of the Court by Napton, Judge.

Lorton was indicted by the grand jury of St. Louis county, for stealing the goods and chattels of Richmond Curle, and at the same time was also indicted for stealing the goods of one John B. Gibson. The defendant plead guilty to the first indictment, and to the second plead a former conviction for the same offence. It appears from the bill of exceptions, that the prisoner on the day mentioned in the indictment, was found in a room of the Missouri Hotel, in the city of St. Louis, at a late hour in the evening, and being seized by Richmond Curle, and one John B. Gibson, who were lodgers therein, and who were awakened by the noise made by the prisoner, confessed that he had been concerned in stealing goods therefrom, in company with another, and search being immediately made, the goods of said Curle and Gibson were found lying on the stair steps and in the passage, where they had been dropped by the thief, who was making off with them. The goods of Curle and Gibson were

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found precisely in the same condition. The prisoner had been sentenced under the first indictment to two years imprisonment in the penitentiary. The prisoner, by his counsel, prayed the court to instruct the jury, that if they believed from the evidence that the goods of Curle and Gibson were stolen at one and the same time, then the circumstance of said goods belonging to separate owners did not constitute several offences, and that if any person by the same act and at the same time should steal the goods of A, B, and C, this constituted but one felony, or offence against the State; and that if they should believe under the preceding instruction, that the stealing of the goods of said Curle and Gibson was one transaction, then the former conviction of the prisoner operated as a bar. The court refused to give this instruction: the prisoner excepted, and moved for a new trial, which was overruled, and the case is brought here by error.

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v.
The State.

The court should have given the instructions asked by the prisoner. The stealing of several articles of property, at the same time and place, undoubtedly constitutes but one offence against the laws, and the circumstance of several ownerships cannot increase or mitigate the nature of the offence.

The stealing of several articles of property at the same time and place, constitutes but one offence, and the circumstance of several ownerships of the property cannot increase or mitigate the nature of the offence.

The judgment will be reversed.

HILL v. DEEVER.

1. The error of law alluded to in the second section of the act regulating "Practice at Law," (R. C. 1835, p. 470)—on a motion for a second new trial—must be a misconception of the instructions of the court, or of the general law governing the case (where no instructions have been given,) or an entire disregard of such instructions, which must be inferred from by a comparison of the verdict with the facts in evidence.
2. But where there is conflicting testimony submitted to the jury, and the facts found are supported by the testimony, there is no ground for supposing a misapprehension or perversion of the law, and consequently no ground for a second new trial.

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1841.

Opinion of the Court by Napton, Judge.

Hill
v.
Deavor.

Hill sued Deavor in assumpsit for certain lumber furnished the latter, at his special instance and request. The defendant plead the general issue, and went to trial. Verdict was for plaintiff, defendant moved for a new trial, because the verdict was against evidence and against law, and because new testimony had been discovered. The motion was sustained, and a new trial granted. The second trial resulted as the first, in favor of the plaintiff, and defendant again moved for a new trial, on the grounds that the verdict was against law and evidence, against the instructions of the court, and because new testimony had been discovered. An additional motion was filed, asking for a new trial, because the jury had erred in a matter of law in this: "That there was no evidence that defendant ever made any contract in writing with plaintiff for the lumber alleged to have been sold by plaintiff to defendant, nor that there was any part payment for said lumber by defendant, or any thing given by way of earnest, or that there was any delivery of said lumber to defendant. And also in this, that there was no evidence that this lumber was ever delivered to any one by the request of the defendant, or by authority of defendant on defendant's account, Yet the jury, in violation of the law concerning contracts and the general law, &c. gave a verdict for plaintiff."

This motion was also sustained by the court, and a second new trial awarded, to which decision of the court, the plaintiff excepted. Upon this trial the defendant had a verdict and judgment in his favor. The plaintiff moved to set aside the last verdict, and reinstate the second verdict, because the court had improperly granted the second new trial.

The whole testimony is preserved in the bill of exceptions. A detail of it is not necessary to an understanding of the points involved in this case. It seems that Hill, a lumber merchant, was applied to by a house builder, who had undertaken to put up a house for Deavor, and furnish the materials, for lumber; but Hill refused to let the carpenter have the lumber unless upon an order from Deavor. An

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order for one hundred dollars worth was procured by the carpenter from Deaver's clerk, which was accordingly complied with by Hill. A second application for additional lumber was made, and the same reply was given by Hill, whereupon the carpenter made a second application to Deaver's clerk for another order which the clerk declined giving in Deaver's absence; but according to the testimony of the carpenter, told him to get what lumber he wanted, and have an order for the whole obtained, when Mr. Deaver should return. Hill's clerk testified to about the same thing; but Deaver's clerk testified that he refused to give any order, but advised the house builder to procure what lumber he wished, and get the proper order from Mr. Deaver on his return. The lumber was furnished, to the value of one hundred and ten dollars. Deaver on his return paid off the order for \$100, but refused to pay the account for the remaining \$110, and for this the action was brought.

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Hill
v.
Deaver.

The court instructed the jury that if they should be of opinion that a verbal order was given by the defendant, and that the lumber furnished under said order was originally charged by plaintiff to defendant, then they ought to find for plaintiff. But if the jury shall not be satisfied from the evidence that the verbal order was given by the defendant's agent, and was intended by said agent to be charged against defendant, they shall find for defendant. If the jury shall be of opinion that no part of the lumber was delivered to the defendant, or defendant's agent, they must find for defendant.

A second new trial is authorised by our statute only in one of two cases: First, where the jury have erred in a matter of law, and second, where they have been guilty of misbehavior. The last being out of the question here, the only inquiry is as to the existence of the first case. The reasons alleged in the motion for a second new trial, to show that the jury erred in a matter of law, were that there was no evidence to show any contract in *writing* with defendant, nor any part payment, or any earnest, &c. Now the instruction of the court did not require any evidence of a written order, and if the defendant was dissatisfied with

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The error of law alluded to in the 2d sec. of the act regulating "Practice at Law," (R. C. 1835, p. 470,) —on a motion for a second new trial—must be a misconception of the instructions of the court, or of general law governing the case (where no instructions have been given,) or an entire disregard of such instructions, which must be inferred from by a comparison of the verdict with the facts in evidence. But where there is conflicting testimony submitted to the jury, and the facts found are supported by the testimony, there is no ground for supposing a misapprehension or perversion of the law, and consequently no ground for a second new trial.

that instruction, he should have sought to correct it by a writ of error or appeal. A new trial could not a second time be granted for misdirection of the court. The error of law alluded to by our act, as this court has upon two previous occasions intimated, (*Hill v. Wilkins*, Mo. R.; *Dickey v. Malechi*, 5 Mo. R. p. —,) must be a misconception of the instructions of the court, or of the general law governing the case, (where no instructions have been given,) or an entire disregard of them, which must be inferred by a comparison of the verdict with the facts in testimony.

In this case, the instruction of the court left the jury to adopt either of two hypotheses, and gave them the law governing each. If there was no testimony to maintain the hypothesis found, consistent with the instructions, we might readily conclude either that the jury had misunderstood the instructions, or wilfully disregarded them. In either event, a new trial would be properly granted.

But where there is conflicting testimony submitted to the jury, and the facts found are supported by the testimony, there is no ground for supposing a misapprehension or perversion of the law, and there is no ground for a new trial.

The question before the jury in this case was, whether Deaver, or his agent, had authorised Hill to let the carpenter have lumber. The accounts of what occurred, do not vary much in their terms; but the impression sought to be conveyed by Morris (the house builder) in his testimony is, that Deaver's clerk only objected to giving any more written orders, because of the inconvenience of drawing so many small orders, but distinctly authorized him to procure the lumber on Deaver's account. The same inference might well be drawn from the history of the matter as detailed by the clerk of the plaintiff, Hill. But the clerk of defendant, in his statement, seeks to convey the impression that he declined giving any orders; requested Morris to procure more lumber, but intimated that until Mr. Deaver's return, no responsibility would be incurred by him.

Under this conflicting state of evidence, the jury might well have found as they did without any misconception of the instructions of the court, or any wish to disregard them.

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I am therefore of opinion, that the second new trial was improperly granted, and judgment is accordingly reversed, and the cause remanded.

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1841.

Scott
v.
Brockway.

SCOTT v. BROCKWAY.

Where the issues are submitted to the court, and its verdict is against the evidence, the judgment will be reversed.

Error to St. Louis County Court.

Opinion of the Court by Napton, Judge.

Scott sued Brockway by petition in debt on a note for \$308, and upon making the necessary affidavit, sued out an attachment. The defendant plead several pleas to the action, and a plea in abatement, denying that he had fraudulently conveyed, concealed, or disposed of any of his property for the purpose of hindering, delaying, or defrauding his creditors, as in the affidavit of plaintiff had been alleged. The plaintiff joined issue on these pleas, and the issues were submitted to the court, who found for the defendant. Plaintiff moved for a new trial, on the ground that the verdict was against evidence, which motion was overruled.

The bill of exceptions contains all the testimony, which is in substance as follows: George Scott, a brother of the plaintiff, testified, that the defendant in Sept., 1839, bought a piano of Johnstone, Dreyer, & Trowbridge, and giving the plaintiff the money to pay for it, told him to take the receipt in the name of Henry Brockway (the defendant's brother,) in order that the piano might be secured from the creditors of defendant. Charles Scott, another brother of plaintiff, testified that about the same time, defendant met him and told him that he had just made one hundred dollars by the purchase of a piano for one hundred and eighteen dollars, which was worth two hundred and eighteen dollars, and

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v.
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that upon being asked by the witness if he was not afraid his creditors would take it, he (defendant) answered, he was too smart for that, for he had the receipt for the price of the piano made in the name of his brother Harry Brockway. It was also in proof that the piano had always remained in the possession of the defendant from the time of his aforesaid purchase thereof; and while so in his possession, he had it repaired.

Where the issues are submitted to the court, and its verdict is against the evidence, the judgment will be reversed.

Upon this evidence the court found for the defendant, I could not say that the testimony was entirely conclusive of actual fraud, but unless rebutted or explained, it seems to be a pretty strong prima facie case. The verdict was in my opinion against the evidence, and its judgment will therefore be reversed.

SPROULE & AGNEW v. McNULTY and others.

- 1 A. shipped a quantity of lead to B. with directions to sell the same and apply the proceeds to the payment of a debt, due from A. to B. The lead was insured by B. on his own account, on being advised by A. of the shipment. While in transitu the lead was attached by C. a creditor of A. The only question was, who was the owner of the lead at the time of the attachment? Held. That A. was the owner.
- 2 It seems that a consignment of property, with directions to the consignee to sell the same and apply the proceeds to the payment of a debt due from the consignor to the consignee, is not different from an ordinary case of consignment of property to a factor, with directions to sell the same on account of the consignor. The title to the property remains in the consignor until it is disposed of by the consignee.

Appeal from the Circuit Court of St. Louis county.

Opinion of the Court by Napton, Judge.

This was an attachment by appellants against McNulty, Shaw & Mitchell, which was levied upon a cargo of lead. The appellees, Crawford & Carson, at the return term of the writ, filed their interpleader, claiming the property attached. On the trial of the interpleader, an agreed case was submitted, and the court found for the interpleaders

and gave judgment accordingly. From that judgment an appeal has been taken to this court. The agreed case is found on the record in the following words: "On the 11th July, 1840. the defendants shipped on board the steamboat Omega, 700 pigs of lead, weighing 49,000 lbs. to the interpleaders William Crawford, jr., and Th. J. Carson, at Baltimore, Maryland, for the express purpose of paying in part a note part due and unpaid, from defendants to interpleaders. The lead was assigned to Kennet, White & co., commission and forwarding merchants of St. Louis, with instructions accompanying it to forward the same to the interpleaders at Baltimore, through Hugh C. Hasson, their agent, a commission and forwarding merchant at New Orleans, Louisiana, as early as possible. Four bills of lading were executed for the lead between the defendants and the carriers, at the time of shipment; one of which was retained by the shippers, the defendants; another was forwarded to said Hugh C. Hasson; another was forwarded to Kennett, White & co., and another to the interpleaders, accompanied with a letter informing them of the shipment of the lead, and requesting them to receive the same, dispose of it for the interest of defendants, and apply the proceeds in liquidation of the aforesaid note due and unpaid. That accordingly the interpleaders immediately insured the lead on their own account. When the lead arrived in St. Louis, on its passage to Baltimore to the interpleaders, and came into the possession of Kennett, White & co., and before it was forwarded by them to interpleaders, as above directed, it was attached by the plaintiffs in this suit. The only question arising in this case is, who were the owners of the lead, at the time it was attached, the shippers, or the interpleaders? A great many authorities have been presented to the court, consisting of decisions made both in England and in this country. These decisions, and the opinions of learned jurists, have satisfied me, at least, that the *lex mercatoria*, is of a very plastic nature, adapting itself very much to the peculiar circumstances of each case. It appears impossible to draw any general rule of a binding and conclusive character, as applicable to the class of cases under which the present

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case might be included. There is no settled and determinate test of ownership, either in England or this country. To complete a contract of sale, there must be a delivery, either actual or implied. A delivery to the carrier, where there has been an order for the goods, is undoubtedly a delivery to the consignee. Where a debtor consigns property to his creditor, in payment of his debt, and there is any assent on the part of the creditor, a delivery to the carrier in this case, has also been held a delivery to the creditor. So far the doctrine appears very reasonable. But it has also been held, both in England and in some of our State tribunals, that if a debtor consigns property to his creditor, though the creditor be entirely ignorant of the fact, the delivery to the carrier is a delivery to the creditor, and his assent will be presumed. This was, for the first time I believe, declared to be law by the judges in the case of *Atkyn v. Barwick*, (1 Strange, 165.) The same doctrine was recognised by Lord Mansfield in the case of *Anderson & others v. Temple*, (4 Burr. R. 1768.) In this case Lord Mansfield maintained the following doctrine: "The most desirable object in all judicial determinations, especially *mercantile* ones, (which ought to be determined upon natural justice and not upon the niceties of the law,) is to *do substantial justice*. And therefore I will avoid laying the stress that might properly be laid upon the assent being necessary to complete the contract, or the want of a delivery; the solid ground of which is, that a contract shall be presumed complete upon any distinction where the justice of the case requires it, though there is no *actual* delivery. And it is settled, that if a man sends bills of exchange, or consigns a cargo, and the person to whom he sends them has paid the value before, though he did not know of the sending them at the time, the sending of them to the carrier will be sufficient to prevent the assignees from taking these goods back, in case of an intervening act of bankruptcy: but if goods or bills of exchange are sent, and the consideration has not been received, the court of chancery always interposes. In the case in *Strange*, there is no doubt but the honesty of the case inclined the court to the judgment they gave, the *reason given*

turns upon a subtlety. I think the case was well supported upon other grounds than those mentioned in the book." MAY TERM,
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The case turned upon a question of fraud, but the other three judges, though concurring with Lord Mansfield in the disposition of the cause, agreed that an *assent* was necessary to *complete* every contract, that the act of bankruptcy occurring on the 8th November, and the defendant having never accepted until the 10th, the *contract* was incomplete, and upon the whole circumstance, pronounced the transaction fraudulent and void." The English authorities then, to establish the very broad proposition that the property vests in the consignee, who happens to be a creditor, upon delivery to the carrier, without any assent upon the part of the consignee, appear to rest entirely upon the decision in *Strange*, and upon the opinion of Lord Mansfield in *Anderson v. Temple*. Sproule &
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The case of *Wood v. Roach*, (2 Dall. 1 & 1,) is cited in support of the same doctrine. In that case the opinion of the court is very brief, but clearly assumes the position that when the bills of lading are signed, the property is gone from the consignor, and that fact was accordingly left to the jury. The rule is stated by the judge, delivering the opinion, to be founded on mercantile principles, and the inconvenience of the opposite doctrine. In the case of *Summerville v. Elder*, (1 Binney R. 106,) it was held, that if an agent, indebted to his principal, ship property to him on board a vessel belonging to a third person, and the captain signs a bill of lading deliverable to the principal, the property thereupon vests in the principal, and the agent cannot countermand or disturb the shipment.

This decision, however, may very well rest upon principles, other than those embraced in the previous cases, and is only applicable to the principle now under consideration, so far as it determines the effect of signing a bill of lading.

These are the only cases, which I have seen, that sustain the proposition in the unconditional manner I have mentioned.

In the case of *D. & G. Ludlow, v. Bourne & Eddy*, (1 Johns. R. 1,) the opinion of the supreme court of New York

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is given upon this question. Judge Thompson in that case says, "I do not think it necessary to controvert the general proposition, that when goods are shipped on account of, and consigned to a foreign merchant, the property shall *prima facie* be deemed vested in the consignee, subject to the right of stopping *in transitu* in case of insolvency. In such cases, probably, the master of the ship ought to be considered as the agent for the consignee, and the delivery to the former is a delivery to the latter; neither can it be denied, that where the consignment is for account of the consignor, the property remains vested in him, and he is deemed the legal owner. The consignment is always subject to be controlled and explained according to the understanding and evident intent of the parties."

The judge further observes: "A distinction is sometimes made between an actual delivery to the vendee himself, and a constructive delivery to some intermediate person. In the latter case, when the goods are at the risk of the vendee, it is equivalent to an actual delivery. Every legal contract may however be modified, according to the will of the contracting parties: and when special, it is to that we must look in order to sustain their rights."

In the case of the *Frances*, 8 Cranch, 359, the supreme court of the United States held that an intention clearly proved of a consignor of goods, to vest the right of property in the consignee, is not sufficient to effect such a change of property, until the goods are received by the consignee, or some evidence is given of his agreement to take them on his own account, until that time the goods are at the risk of the shippers, and if they are enemies, the goods if captured are good prize.

The same principle was maintained in the opinion on *Durham & Randolph's* claim, contained in the same case. 8 Cranch, 354.

I infer from these cases, that to ascertain where and when the property vests, we must first look to the intention of the parties as evinced by their acts; and secondly, inquire upon whom the risk falls.

In the case at bar, the defendants shipped to the inter-

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A. shipped a quantity of lead to B. with directions to sell the same and apply the proceeds to the payment of a debt due from A. to B. The lead was insured by B. in his own account, on being advised by A. of the shipment.

While in transitu the lead was attached by C., a creditor of A. The only question was, who was the owner of the lead at the time of the attachment?

Held: That A. was the owner.

pleaders, at Baltimore, a cargo of lead, and consigned the same to Kennett, White & co., of St. Louis, with directions to them to forward the same to the interpleaders, through their agent at New Orleans: one of the bills of lading was forwarded to the interpleaders, with instructions that the interpleaders should dispose of the cargo for the benefit of the defendants, and apply the proceeds in liquidation of a note given by defendants to interpleaders, and then due and unpaid.

What was the intention of the defendants in shipping this lead? Was the lead, when the bill of lading was signed, beyond their control; and if lost on the voyage from New Orleans to Baltimore, would the loss have fallen upon the interpleaders?

Assuredly not. Suppose the lead had even reached Baltimore, and the interpleaders had sold the same, upon the usual credit, and to persons of apparent solvency, and yet, from unforeseen accidents, such as prudence could not well guard against, the proceeds were literally nothing; would the defendants have been absolved from their previous obligations? The interpleaders are directed to sell the *lead*, and appropriate the proceeds to satisfy their demand, and if no proceeds accrue, the instructions have been complied with, and the demand is still unsatisfied. It could not, I think, with any plausibility, be contended that the risk, if any, would have fallen upon the interpleaders. If such were the law, all our preconceived notions of the essential elements of a contract, must be false and unfounded. The idea, that when a debtor ships property directly to his creditor in payment of a debt, the law presumes the assent of a creditor, is obviously unfounded. The willingness of a creditor to receive his dues is reasonably enough presumed: but he may and would, where the debtor is not in failing circumstances, be very unwilling to receive a shipment of property at a distant port, with the risk of loss upon himself, or a discharge of the liabilities of the debtor. No such presumption is true in point of fact, however often it may have been decided to be so in law.

It is not very difficult to account for the decision in the

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It seems that a consignm't of property, with directions to the consignee to sell the same and apply the proceeds to the payment of a debt due from the consignor to the consignee, is not different from an ordinary case of consignment of property to a factor, with directions to sell the same on account of the consignor. The title to the property remains in the consignor until it is disposed of by the consignee.

case from *Strange*, and the cases determined in *Pennsylvania*. It seems to have been thought just, that as a debtor had a right to prefer *one* creditor to another, when he gave a clear indication of his wish to do so by a consignment of property, the courts should not interfere in behalf of another creditor for whom no such preference had been exhibited. Hence the courts, as between the assignees of the bankrupt and the preferred creditor, have strained a point, as I conceive, to give efficacy and validity to the intended transfer. Accordingly we find that Lord Mansfield declares the decision in *Strange* was right, but that the judges gave a wrong reason; and admits that the honesty of the case gave an inclination to the determination of the court. Notwithstanding the opinion of a few judges, I am constrained to believe that the weight of authority and reason favors a different view of the law. The interpleaders here, and the plaintiffs in the attachment, are both, I suppose, bona fide creditors of the defendants. Their equities are equal, and whoever gets possession first, must prevail. I am of opinion that no actual or constructive possession was in the interpleaders until their assent to receive the lead, and this assent, if granted to be proved by their insuring the property, was not shown to have taken place until after the levy of the attachment. The plaintiffs below then first obtained possession, and having an equal equity with the claimants in *Baltimore*, their attachment must hold.

The judgment of the circuit court is therefore reversed, and the case remanded.

THIRD JUDICIAL DISTRICT.

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McNULTY v. COLLINS.

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The court adhere to the decision made in Muldrow v. Tappan, (6 Mo. R. 276,) that the declaration, in assumpsit, must aver a *promise* on the part of the defendant, and that the defect is not cured by verdict.

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Appeal from St. Louis Circuit Court.

Geyer for Appellant.

The appellant insists that the judgment is erroneous, for the reasons assigned in arrest of judgment.

1st. The instrument of writing sued upon, as described in the declaration, does not impart a consideration.

2d. The instrument as described in the declaration, is but a written agreement, and a consideration must be averred and proved in order to sustain an action upon it.

3d. The declaration is insufficient, in that it alleges no promises by the defendant, nor any consideration for the agreement.

In declaring upon a contract not under seal, the consideration must be alleged and truly, except in suits upon instruments, which import a consideration. 1 Chitty, 261. It is clear that the instrument described in the declaration is not a promissory note within the Statute of Ann. See Bayley on Bills, p. 9, and notes of cases there cited. If it be supposed that an acknowledgment of indebtedness on the face of the instrument implies a promise to pay the plaintiff, and that the instrument is, therefore, within the first section of the act concerning bonds and notes. Still it is not described as such, nor is any promise whatever alleged. 1 Chitty, 266; 6 Mo. R. 276, Muldrow v. Tappan et al.

Opinion of the Court by Napton, Judge.

This was an action of assumpsit brought by Charles Collins, against the appellant. The declaration alleged that on the 17th July, 1838, the appellant made his certain instrument of writing of that date, and thereby acknowledged

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The court adhere to the decision made in *Muldrow v. Tappan*, (6 Mo. R. 276,) that the declaration, in assumpsit, must aver a promise on the part of the defendant, & that the defect is not cured by verdict.

there was due from him to plaintiff the sum of nineteen hundred dollars, &c., payable in soap and candles, at the St. Louis market prices, for value received, which said instrument is dated at the day and year aforesaid, &c. And said plaintiff states that he has demanded said sum of money in

soap and candles, according to the tenor and effect of said instrument from said defendant, but the said defendant has never paid, &c., to the damage, &c.

To this action defendant pleaded non-assumpsit and no consideration. Upon the issues tried, the verdict was for the plaintiff, and defendant moved in arrest of judgment, which motion was overruled. Whereupon defendant appealed. (Various objections are taken to the declaration. It is needless to notice but one, which is sufficiently obvious.

No *promise* is averred. This was held a fatal objection upon a motion in arrest, in the case of *Muldrow v. Tappan* and others. 6 Mo. Rep. p. —.)

Judgment reversed.

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DECISIONS
OF THE
SUPREME COURT OF MISSOURI.

FIRST JUDICIAL DISTRICT,

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DUNNICA, Adm. of Colgin, v. SHARP.

1. In an action for a breach of covenant, for the conveyance of land, where the time of performance has been extended, the right of action accrues as soon as the covenantor becomes bound by his covenant to make the conveyance, and if he is not able to do so, for want of a good title to the land, it is not necessary for the covenantee to offer to rescind the contract, or to make a demand of the deed, before suit brought.
2. In this case the court held the measure of damages to be the purchase money, with legal interest, without any deduction for the rents and profits. It is in general held, that when the vendor's title is altogether defective, he can recover nothing from the vendee by way of rents and profits, because the vendor would be liable to the owner of the land for rents and profits.

Appeal from the Cole Circuit Court.

A. Leonard, for Appellee.

1st. Leave to file three rejoinders to the plaintiff's third replication was properly refused, because: First, The defendant did not show that it was necessary to the attainment of justice, that such leave should be granted. Rev. Stat. Mo., "Practice at Law," 3d art. sec. 30. Second, The first re-

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2d. The questions propounded to the witness, Williams, as to the plaintiff's proving while witness was in possession, knowledge of the boundaries of the land, was properly excluded, as wholly irrelevant to any matter in issue.

Third. The proof proposed by the defendant of his vendor's, his own and his vendees continued possession of the land since the year 1806, under Duckoginth's claim, was rightly excluded.

The only legal purpose of this proof was to establish a legal title in fee in the defendant at the time of his tendering the deed to the plaintiff, and for this purpose it was altogether incompetent, because, 1st, although in an action of ejectment possession of land is evidence of right to the possession, it is no evidence of a legal title in fee. 2d. If under other circumstances, the evidence tendered would have been evidence of a legal title in fee in the defendant, it afforded no such presumption in the present case, because the defendant had already given evidence that the legal title was in Roy's heirs, under whom he claims. 3d. A purchaser is entitled to a title free from doubt. *Hortley v. Pihall*, Puke's N. P. c. 178; *Wilde v. Forte*. 4 Taunt, 341; *Elliott v. Edwards*, 3 Bos & Pull, 181.

Fourth. The fact of the pendency of a suit for a breach of the covenant to convey; at the time the plaintiff demanded a conveyance from the defendant, was properly excluded from the jury as irrelevant to any of the issues submitted to them.

Fifth. The several instructions that were asked by the defendant, and refused by the court, were properly disallowed.

1st. The fact, that the plaintiff demanded a conveyance, was admitted by the pleadings, and for the reason the second instruction was properly rejected.

2d. The third, fourth, and seventeenth instructions were not only incorrect in point of law, but were also mere abstract propositions, wholly irrelevant to any of the evidence given.

3d. The specification by the plaintiff of one objection to the deed at the time it was tendered, did not preclude him from insisting afterwards upon the defendant's want of title, and therefore the seventh instruction was properly disallowed.

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4th The twelfth instruction was incorrect in point of law, and if it were correct, there was no evidence given that would have warranted this instruction.

5th. The measure of damages upon the breach of a covenant to convey is not confined to the consideration paid, with interest, to be calculated from the time of the demand of the conveyance, and therefore the thirteenth instruction could not have been lawfully given.

6th. A purchaser's right to real damages, or to interest upon his purchase money, does rest upon his having before the commencement of the suit, rescinded, or offered to rescind the contract, or upon his having rescinded, or offered to rescind the contract and deliver up the possession of the land, or upon having given the vendor notice of his intention to abandon the contract, and having required the vendor to return the purchase money, and therefore the fourteenth, fifteenth, and sixteenth instructions were properly rejected.

7th. The decree in equity between the defendant and the unknown heirs of Roy, is no evidence of the existence of a legal title to the land in the defendant at the time of the tender of the deed, and for this reason the eighteenth instruction was rightly withheld.

8th. The right of a purchaser, where there has been a failure to convey, to any interest upon his purchase money, does not depend upon the fact that he has surrendered or offered to surrender the possession of the land, and therefore the nineteenth instruction was properly refused.

9th. The measure of damages on a breach of a covenant to convey, where there has been no fraud or misconduct on the part of the vendor, is the consideration paid, with interest from the time of its payment, and therefore the twenty-first instruction was properly refused. *Flurean v. Thornhill*, Sir W. Black. Rep., 1078; *Hopkins v. Grazebrook*, 6 Barn. & Crop, 31; *Walker v. Moore*, 10 Barn. & Crop, 416:

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10th. The penalty contained in this obligation does not limit the defendant's liability, and if it do, the withholding the twenty-second instruction is no ground of reversal, as the damages actually assessed were less than the penalty.

11th. Where there is a breach of a covenant to convey on request, the interest is to be calculated from the time of the payment of the purchase, and is not confined to the time of the demand, and therefore the twenty-third instruction was rightly refused.

Opinion of the Court by Tompkins, Judge.

In the circuit court Sharp was plaintiff, and had a judgment, to reverse which Colgan appealed to this court.

The action was brought on a covenant, executed on the 1st November, 1818, by Colgan, to bargain and sell to Sharp forty arpens of land in the village of Cote Sans Dessien, "it being the possession which Colgan had purchased of the then late Jesse Evans;" Colgan too, by said writing, covenanted to warrant and defend the said land to the said Sharp, his heirs, and assigns, and to attend at the house of said Sharp on the first day of January, 1819, to perfect said agreement, by giving his obligation for securing and confirming it in general warranty to said Sharp, his heirs and assigns, and to put Sharp forthwith into possession of the premises, and as the same was rented to one Asa Williams, Sharp was to receive all the rents and profits arising from the tenancy of Williams. For the performance of their respective covenants, Colgan to convey, &c., and Sharp to pay the consideration, the parties respectively bound themselves in the sum of one thousand dollars.

The breaches assigned are,

1st. That Colgan did not on the first day of January next after the date of the said covenant, or at any other time, perfect the said agreement, by giving the necessary obligation for securing and confirming the title to the said land to said Sharp, and he had not yet done it.

2d. That he, Sharp, has never received the rents and profits, &c. AUGUST TERM,
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3d. That said Colgan has not paid the said Sharp the said sum of one thousand dollars.

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Colgan pleaded, 1st, that at the time appointed he went to the house of Sharp to make a deed according to the agreement, and offered to execute it, but that the plaintiff then waived the same, and excused the defendant, agreeing that the original covenant, called a memorandum of an agreement, if recorded, would be as good as a deed made in pursuance of the said memorandum of an agreement, with an averment that from that time hitherto he had been ready and willing, and still was so, to make a deed.

2d plea. After stating the same preliminary facts, it is averred that by mutual consent the time of making the deed was postponed, and that after the first day of January next, succeeding the date of said agreement he, Colgan, had made and tendered a deed to Sharp, and that Sharp refused to execute it, and that he is still willing to make one.

3d plea. That at the time of making the agreement he did put the plaintiff into the possession of the premises according to agreement.

4th plea. That the defendant did recover all the rents and profits, &c.

5th. That before the commencement of this action the defendant paid to said plaintiff said sum of one thousand dollars.

The plaintiff replied to the first plea, first, that at the time the defendant offered to make the deed the title in fee was not in him, and concluded to the country.

2d. That the defendant did not, within a reasonable time after making said supposed parol agreement, offer to make a deed according to the original agreement.

3d. That after said supposed verbal agreement, and before the commencement of this suit, the plaintiff demanded a deed, and the defendant refused to give one agreeably to the original agreement.

4th. That the defendant did not agreeably to the original contract, tender to the plaintiff at his house a deed, and the

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To the second plea :

1st. That the defendant did not after the 1st day of January, 1819, and before the commencement of this suit, execute a deed of conveyance of this land, and tender it agreeably to contract.

2d. That at the time of the alleged tender, and refusal to receive a deed, according to agreement, the title in fee was not in the defendant.

3d. Same as the first replication to the first plea.

4th. That after the time of making said supposed parol agreement, and before the alleged tender of the deed, a reasonable time to perfect the original agreement had elapsed, and the defendant did not, within such reasonable time after making said supposed parol agreement, and before the alleged subsequent tender, perfect the original agreement.

5th. Same as the 4th replication to the first plea.

To the third, fourth, and fifth pleas, the plaintiff took issue. To the replications the defendant rejoined as follows :

To the first and second replications to the first plea, and to the third replication to the second plea, the defendant demurred.

To the fourth replication to the first plea, and to the first, second, and fourth replications to the second plea, the defendant joined issue in fact.

To the third replication to the first plea, the defendant rejoined, traversing the facts stated in such replication, and concluded to the country.

To the fifth replication to the second plea, the defendants rejoined, traversing the facts stated in that replication, and concluded to the country.

The plaintiff joined the defendants demurrers to the first and second replication to first plea, and to the third replication to the second plea, and surrejoined to the rejoinder to the third replication to the defendant's first plea.

The cause presented in the circuit court three issues of law, involving the sufficiency of the following pleadings on the part of the plaintiff: of these it is useless to say any

thing, as the correctness of the decision in the circuit court cannot be reviewed, the judgment being ultimately for the plaintiff, against whom the demurrers were decided.

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On the trial of the cause, the plaintiff gave in evidence the writing declared on, that he had paid the consideration, and that he had demanded a deed of conveyance. All of the evidence given by the defendant, material to be here noticed is, that on the first day of January, 1819, according to his written agreement, Colgan went to the house of Sharp, and, after some conversation on the subject of making a deed for the premises, it was agreed betwixt them, that a deed made by Colgan would be no better than the covenant already executed by him and Sharp would be, if it were recorded; and Sharp verbally agreed with Colgan to postpone the making of the deed. No definite time of postponement was agreed on. Colgan, it appears, had been before sued on the same cause of action; and pending this action Sharp had demanded a deed, after he had verbally dispensed for an indefinite period, with the making of the deed by Colgan. Colgan, in the year 1836, tendered to Sharp a deed, which Sharp would not accept. The evidence of Colgan's title to the land covenanted to be sold, is as follows: On the 30th day of December, 1830, Baptiste Duchouquette addressed a petition to M. Delassus, lieutenant governor of the province, praying a grant to him of four thousand arpens of land, to be taken within certain limits therein mentioned. To this petition the lieutenant governor, after making some preliminary observations, answered in these words: "I do grant to him, under the same boundaries as he asks [the land] in fee simple for him, or any other who may represent him his rights, dispensing him of the survey on account of the existing great distance, until some concession, being granted in the vicinity, will oblige him to show his lines, and the surveyor of this Upper Louisiana, Don Antonio Soulard, shall take cognisance of his title, for his intelligence and government, in what concerns him; after which, the party interested shall have to solicit the title in form from the lieutenant general of these provinces, to whom alone corresponds,

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Mean conveyances from Duchouquette down to Colgan were shown, and evidence of possession, held by those claiming under Duchouquette for a long time, was offered by the plaintiff, but rejected by the court. Many instructions were asked, and exceptions taken, to the refusal to give them; but the defendant's counsel have narrowed their objections down to the refusal of the court to give the following viz :

That the court refused to permit the defendant to give evidence of a prior suit pending on the same breach of covenant by the plaintiff, against the defendant, and has prevented the defendant from complying with a demand made pending the suit, for a specific performance of the contract.

The court erred in instructing the jury, that although the parties waived to an indefinite time the making of a deed or obligation for the land according to the covenant, no demand after waiver need be proved to have been made by the plaintiff from the defendant, before suit brought.

The court erred in instructing the jury, that although a demand was necessary by the plaintiff to make a deed, yet the plaintiff could recover damages for interest before such demand was made.

The court erred in instructing the jury that the plaintiff could recover the consideration money and interest, rescinding or offering to rescind [the contract,] and without delivering, or offering to deliver the possession of the land covenanted to be conveyed by the defendant.

The court erred in instructing the jury that although the plaintiff possessed, occupied and enjoyed the land, before demand of title or suit brought, yet the plaintiff could recover interest upon such purchase money pending such occupancy.

The points necessary to be settled in this case are :

1st. Did Colgan show in himself any title to the land.

2d. After Sharp agreed to prolong the time of making the deed by Colgan, did it become necessary for him to make demand of a deed to entitle him to his right of action against

Colgan? and if so, from what time would he be entitled to interest on the purchase money? AUGUST TERM,
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3d. Was it necessary for Sharp to offer to rescind the contract in order to entitle him to recover the consideration money and interest in an action for a breach of covenant.

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1st point. It may not be amiss to observe that it is very difficult to translate correctly into the English language the words used by the lieutenant governor Delassus, in answer to the petition of Duchouquette. The official correspondence of the lieutenant governor, we are bound to believe was expressed in appropriate language. It is well known that the translator of the petition, and the answer thereto, is a man of education and strict integrity. Yet because he was not a lawyer, and because of the difficulty of finding words in the English language corresponding in meaning with those used by M. Delassus, he is made to say that he gives the land to Duchouquette in fee simple. But we learn from the following part of the communication that he had no authority to do more than authorise Duchouquette to settle on the land, and to direct the surveyor of the province to mark out the boundaries; after which, continues the lieutenant governor, "the party interested will have to solicit the title in form from the lieutenant general of these provinces of Louisiana, to whom alone corresponds by royal order, the distributing and granting all classes of lands of the royal domains."

There has been no evidence given, that this land ever was surveyed previous to the occupation of the country by the United States; nor does it appear that it ever was confirmed by any act of congress, or indeed that it was ever recommended by any board of commissioners for confirmation. We are then driven to the conclusion that the title remains in the United States, and that the possession of Colgan, and of those under whom he claimed, was tortious, and consequently a deed from him can convey no right or title. It could answer no purpose then, either to offer to rescind the contract entered into with Colgan, or to make any demand of a deed after Sharp had agreed to prolong the time of making a deed.

In an action for a breach of covenant, for the conveyance of land, where the time of performance has been extended, the

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right of action accrues as soon as the covenantor becomes bound by his covenant to make the conveyance, and if he is not able to do so for want of a good title to the land, it is not necessary for the covenantor to offer to rescind the contract, or to make a demand of the deed, before suit brought.

The action is covenant, and the right of action accrued as soon as he, Colgan, became liable to make the deed, if he were unable to do it.

One would suppose that the only possible inquiry in such an action would be the amount of damages. To prove that the plaintiff, Sharp, should have offered to re-deliver the premises, and could recover no interest, but would lose his interest in consideration of his enjoying the rents and profits of the premises, we are referred to the cases of Wickliffe v. Clay, 1st. Dana, 594; and Taylor v. Porter, same vol. 423-4; and Bullock v. Bremiss, 4th Marshall, 424; which were all cases in Chancery, and where the vendors had some color of right to the property sold, and that too was improved property. In the strictness of legal proceedings, Colgan, defendant in this action of covenant, could get no allowance for rents and profits. He must have resorted to a court of equity for that and all other relief; but in order to do him justice in this court, the circuit court, with the assent of Sharp, the plaintiff, instructed the jury to deduct the value of the rents, &c., from the interest on the purchase money. When this case was formally before this court, it was said said by the court that legal interest and purchase money was the proper measure of damages. See 4th vol. Mo. Dec. p. 263.

And as above observed, the jury were directed to deduct from the interest the amount of the rents and profits. Thus the circuit court, the plaintiff's counsel not resisting by this instruction, gave Colgan all he could have obtained, either in a cross action at law, or by a decree in a court of chancery. It is in general held, that when the vendor's title is altogether defective, he can recover nothing from the vendee by way of rents and profits, because the vendee would be liable to the proprietor of the land; but the United States appear in this case to have been the proprietors, and Colgan has been treated by the circuit court, so far as the rents and profits are concerned, as if he had a right to receive rent. In every view I have been able to take of the case, the decisions of the court have been such that Colgan had no room to complain.

In this case the court held the measure of damages to be the purchase money with legal interest, without any deduction for the rents and profits. It is in general held that, when the vendor's title is altogether defective, he can recover nothing from

I am therefore of opinion that the judgment ought to be affirmed, and the other judges concurring, the judgment of the circuit court is affirmed.

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the vendee by way of rents and profits, because the vendee would be liable to the owner of the land for rents and profits.

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JONES & others v. THE STATE, to use of BLOW.

1. Action of debt on a constable's bond. The bond was handed to the clerk of the county court in vacation, who received the same, endorsed it "filed," subscribed his name thereto, and filed it in his office, where it has ever since remained: Held, to be sufficient evidence of the approval of the bond by the clerk, for the statute does not declare that his approval shall be expressed in any particular manner.
2. The failure of the county court to approve of, or reject, a constable's bond, taken by the clerk in vacation, will not invalidate the bond. The duty enjoined upon the county court, in this respect, was intended for the security of the public, and their omission to perform such duty cannot injure the constable and his securities.

Appeal from the Cole Circuit Court.

A. Leonard for Appellants.

For the reversal of the judgment, the counsel for the appellants will insist in argument upon the following points and authorities:

1st. In order to give validity to a bond or other deed, there must be a delivery and acceptance thereof.

2d. This is a statute bond, and the acceptance thereof can only be in the mode prescribed by the statute; and if there be no such acceptance, the bond is void.

3d. The statute concerning constables, requires bonds of this description, when given in vacation, to be approved or rejected by the clerk; and when taken by the clerk, to be approved or rejected by the court, at its first term thereafter. Rev. Laws Mo. 116.

4th. The present bond was never approved by the court.

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The tribunal appointed by law for that purpose has never accepted this bond, and therefore it is void.

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S. M. Bay for Appellee.

The appellants here seek to avoid their bond, entered into by them voluntarily, and in the form prescribed by the statute, because, as they say, the bond was not accepted in the manner prescribed by law, nor approved or rejected by the clerk in vacation, or the county court at its next term thereafter. And herein I contend :

1st. That the provisions of the statute concerning constables, so far as they relate to the approval or rejection of the bond by the clerk, in vacation, or the county court at its next term thereafter, are directory, and intended for the security of the public, and not for the benefit of the constable and his securities.

2d. That the statute does not declare that these omissions of duty on the part of the clerk and county court, shall invalidate the bond, and there is no rule of the common law sustaining any such position.

3d. That as the bond was entered into voluntarily, and in the form prescribed by the statute, and for a laudable purpose ; and as the public good requires that official bonds, thus entered into, should be sustained, the courts will not hold them invalid unless compelled to do so by some positive rule of law. See R. C. 1835, title "Constables," p. 116 : Post v. Caulk, 3 Mo. R. 35; U. S. v. Bradley, 10 Peters, 343; Morse v. Hodson, et al. 5 Mass. 313; 3 do. 86; 14 do. 167; The People v. Collins, 7 John. R. 549; Wise v. Blackley, 1 John. Ch. R. 607; 3 Monroe, 213, 204; 1 J. J. Marshall, 357; 2 do. 416; 2 Bibb, 199; 4 Littel, 235; 2 do. 306.

4th. That there was a valid *delivery* of the bond to the proper officer, and by him *accepted* as the official bond of the constable. And herein it is contended :

First, That a deed may be delivered without any words passing. "If a man deliver a deed *without* saying *any thing*, it is a good delivery." 1 Inst. 496. "The delivery is sufficient without speaking any words." Ib. 360. "And as a deed may be delivered to the party without words, so

may a deed be delivered by words without any act of delivery." 1 Inst. 360. *Non quod dictum est, sed quod factum est inspicitur.* Thoroughgood's case, 9 Coke R. 137. AUGUST TERM,
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Second, The obligors had done all that was necessary on their part to make a complete and valid delivery.

They executed the bond in the form prescribed by the statute, and placed it in the custody of the proper officer, without any condition or limitation, and having thereby parted with all power and control over the bond, the delivery was complete.

Third, The *reception* and *detention* of an official bond, by the proper officer, for a considerable time, without objection, is sufficient evidence of its acceptance. U. S. v. Norvell, Gilpin's D. C. R. 120.

Opinion of the Court by Tompkins, Judge.

This was an action instituted in the name of the State of Missouri, to the use of Blow, in a justices' court, against Jones, Miller, and Paulsel, on a writing alleged to be Jones' official bond, as constable, for his failing to make return of an execution delivered to him as constable, to be executed. Upon the trial in the justices' court, judgment was given against the defendants, and they removed the cause by appeal into the circuit court of Cole county. In that court the following case was agreed on by the parties, viz: That Jones was elected constable of the township of Jefferson on the 4th day of August, 1838, and that on the 22d day of the same month he as principal, with Miller and Paulsel as securities, signed and sealed an instrument of writing set out in the record, and purporting to be the official bond of Jones as constable: that on the said day of the date of that bond it was offered to the clerk of the county court, as Jones' official bond, and that the clerk received the same, and indorsed it as filed, and to such indorsement subscribed his name, and filed it in his office, where it has ever since remained, and now still remains: that the clerk, at the time of receiving such instrument, was acquainted with the securities, but did

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not recollect that he exercised his judgment upon their sufficiency, or upon the sufficiency of the bond: that the next succeeding term of the county court of Cole county was held, and that neither at that, nor at any subsequent term of said court was the said instrument of writing either approved or rejected by the court, nor was it ever presented to said court for any action thereon: that the clerk never made any writing or entry either approving or rejecting such instrument, nor did any act approving or rejecting said instrument, except as aforesaid. It was also admitted that Blow obtained a judgment, sued out execution, and delivered it to Jones, the defendant, as stated in the complaint, and that Jones failed and neglected to return the said execution, as charged in the plaintiff's complaint. It was further agreed, that if upon these facts the court should be of opinion that the writing was obligatory upon the defendants, Miller and Paulsel as their bond, their judgment should be given against all the defendants, otherwise it should be given for them. The circuit court decided that the instrument of writing was obligatory on all the defendants, as the official bond of Jones.

To reverse the decision of the court on this point this appeal is prosecuted.

The act respecting constables provides, that the bond shall be approved of by the court, or clerk in vacation, and if taken by the clerk in vacation, shall be approved of or rejected by the court at the next term. The delivery of the bond by the defendants is admitted, the clerk received the bond from their hands and marked it "filed," and placed on his files, which he had no authority in law to do unless he had previously exercised his judgment on the sufficiency of the bond, and approved it. This act of the clerk, then, appears to me to be conclusive evidence that he did approve the bond: for the law no where declares in what manner his approbation shall be expressed. See the act at page 116 of the Digest of 1835. But neither at the next term, nor at any subsequent term, did the county court express any will either to approve or to reject the bond. By this neglect of the county court, the public might be sufferers in case the

Action of debt on a constable's bond. The bond was handed to the clerk of the county court in vacation, who received the same, endorsed it "filed," subscribed his name thereto, and filed it in his office, where it has ever since remained. Held to be sufficient evidence of the approval of

securities were insufficient, (and it is not contended that the instrument of writing is not expressed in apt terms,) but certainly the failure of the county court to act on this instrument of writing at the first or any subsequent term, could do Jones and his securities no injury. He wanted the emoluments of office, and he enjoyed them; the action of the court on the bond was required by law only to secure more effectually the interests of the rest of the community.

It seems then, to me, that this bond ought to be held good against Jones and his security.

In the district courts of the United States it has been decided that the reception and detention of an official bond by the postmaster general, for a considerable time without objection, is sufficient evidence of its acceptance. See 1st Peters' Digest, 383; on this authority, then, as well as on the reasonableness of the thing, we may rest an opinion that the clerk of the county court of Cole county accepted and approved the bond in the sense of the statute. In the United States v. Tuyvy, the supreme court of the United States held that a voluntary bond given to the United States and not prescribed by law, is a valid instrument.

The bond of Jones then is good, because he voluntarily with his securities executed it, and its obligatory character is not invalidated because the act of the legislature required him to execute one, although it has not been approved by the court; as before observed, the omission of the county court to approve this bond, could not possibly injure him and his security, and ought not to impair the security which suitors were intended to derive from the action of the county court.

For the reasons above given, the judgment of the circuit court ought to be affirmed, and in this opinion each member of the court concurs; and it is accordingly affirmed.

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the bond by
the clerk, for
the statute
does not de-
clare that his
approval shall
be expressed
in any parti-
cular manner.

The failure
of the county
court to ap-
prove or re-
ject a const-
able's bond,
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duty enjoined
upon the
county court,
in this res-
pect, was in-
tended for the
security of
the public,
and their
omission to
perform such
duty cannot
injure the
constable and
his securities.

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THORNTON V. SMITH AND CROWTHER.

 Thornton
v.
Smith and
Crowther.

A. cannot sue B. either at law or in equity, on a bond made by the latter to C. to pay A. a certain sum of money, for which the obligor has received no consideration.

Appeal from the Circuit Court of Cooper county.

Hayden & Miller for Appellants.

The counsel for appellant will insist, that the circuit court erred in the decree rendered in this cause, and that said court should have made a decree against said Smith for the payment of complainants debt against Crowther.

1st. The statute of frauds requires every declaration or creation of trust of any lands, tenements, &c., to be reduced to writing, and signed by the party declaring such trust, except resulting trusts, and trusts by implication of law. See Roberts on Trusts, page 91; Revised Code, 1836, Frauds.

2d. When the trust is declared, it vests absolutely, and passes immediately the legal estate in the trustee, and the equitable estate in the *cistui qui* trust, and chancery will compel the execution. 4 Kent, 302 and 303; 2 J. C. 307.

3d. The trustee cannot alter, change, impair, or destroy the vested interest of the *cestui qui* trust. 4 Kent, 311; 4 J. C. R., 138.

4th. A trust is good and binding for payment of debts, though the creditors are not parties to the trust deed.—Cases in Chancery, Leech v. Leech, p. 249.

5th. It is immaterial whether a trust created for an individual, and the better security of his debt, was known to him for whose benefit it was made at the time of its creation, when it comes to his knowledge he may enforce performance of it in chancery. See 4 Kent, 307, Moses v. Murgatroyd, 1 John. C. R., 129; Nelson v. Blight, 1 John. Cases, 205; Shepherd v. McEvans, 4 J. C. R., 138.

6th. A trust cannot be revoked by the person declaring the trust, except the *power* is expressly reserved in the trust deed, and that revocation must be by an act of equal solemn-

nity with that which created the trust. See Fonblanque, p. AUGUST TERM, 1841. 454; 7 J. C. R., 272.

7th. The intentions of the party declaring the trust are evidenced alone by the trust deed. Parol evidence is inadmissible to alter, vary, or modify the trust there declared. No collateral or parol declarations can be admitted to prove other and additional or different trusts than those contained in the deed, except in cases of fraud and circumvention. See *St. John v. Benedict*, 6 John. C. R., 111; *Steen v. Steen*, 5 J. C. R., p. 1; *Jackson v. Stanley*, 10 John. C. R., 139; *Jackson v. Gaer*, 13 J. C. R., 518; *Roberts on Frauds*, 94; *Sugden on Vendors*, 414, 415; 4 Kent, 310.

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8. A trustee who once accepts the trust and acts under it, cannot afterwards divest himself of the trust, except by the consent of the *cestui qui* trust, or authority of the court. See 4 Kent, 311; *Shepherd v. McEvans*, 136, 4 J. C. R.

9th. In this case there was an express understanding by Smith, by deed, to pay off these debts of Crowther, and as it was a contract under seal and covenant to pay Thornton and others, they could not sue at law, but they must resort to a court of chancery, which will enforce the execution of the trust. See 1 Chitty, page 2; See Fonb. top paging, 460, and note (b.)

Wilson for Appellees.

1st. That the bond and deed being made at one and the same time, between the same parties, in relation to the same subject matter, (though on different pieces of paper,) are to all intents and purposes one and the same instrument, which instrument is nothing more nor less than a deed of trust making defendant trustee to secure the debts of Crowther therein provided for. *Stow v. Tift*, 15 J. R., 458 and 205, and authorities there cited. No particular form of words is requisite to create a deed of trust. The intent is what the courts look to. *Fisher v. Fidds*, 10 J. R. 505: 2 Fonb. 36.

2d. A trustee is not chargeable with more than he has received, without fraud, or gross negligence. 2 J. C. R. 1.

3d. The complainant has no right to have a decree set

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aside, which is made in conformity with the prayer of the bill, which for ought appears to this court, will, when carried into effect, fully discharge complainant's debt sought to be recovered, unless he chooses to use as evidence the allegations of the defendant in his answer, that the property conveyed in trust has since depreciated in value so as to be insufficient for that purpose, which is denied by complainants replication, and of which there is no proof. But admit the fact so to be, equity will not enforce a contract where from a material change of circumstances since the contract, the performance would be attended with peculiar hardship to defendant. 1 Fonb. 48 and 118; 4 Littel. Reps. 398.

4th. The trust created by Smith and Crowther is evidently for the benefit of Compt, (although done without his knowledge,) which he affirms by praying in his bill for a sale of the same, and thus endeavors to enforce the same, which he has a right to do. 1 J. C. R., 119; 3 J. C. R., 229 and 261, and 4 J. C. R., 136.

Opinion of the Court by Tompkins, Judge.

Thornton filed his bill of complaint in the circuit court of Cooper county against the appellees, and being dissatisfied with the decree of that court appealed to this court.

In the bill he states that Crowther had executed his note to him for the sum of two hundred and twenty dollars, which being lost, he could not correctly set it out, but that it had become due long before the bill was filed. And that Crowther, being so indebted, on or about the 24th June, 1837, together with his wife, made a mortgage, or deed of trust, whereby was conveyed to one David Smith, of said county of Cooper, the east half a lot in the town of Boonville, to pay to the complainant the sum of two hundred and twenty dollars above mentioned; and that on the same day Smith executed to Crowther his own bond, by which Smith bound himself to Crowther, among other things, to pay the complainant the said sum of two hundred and twenty dollars, and prays that he may be decreed to pay the same.

The deed of trust was made on exhibit. It was made to AUGUST TERM.
secure the following sums of money to the persons herein **1841.**
after named, viz.

To David Smith, the sum of	\$320	Thornton
James Fryer, “	300	v.
John T. Thornton,	220	Smith and
John V. Webb, “	380	Crowther.
Jonathan Bullock,	100	
Moses Chaney, “	100	

Smith made to Crowther a bond by which he bound himself to pay the above mentioned notes in consideration of being secured by the above mentioned deed of trust, and to wait with Crowther twelve months, to be reimbursed with interest, to be paid by Crowther to Smith.

Smith, in his answer admits the allegations in the bill, but states that the property conveyed to him will not produce enough to satisfy the several sums of money above mentioned, and that since the execution of the writing aforesaid, said Crowther had become insolvent, and that if he should advance to the creditors of said Crowther the several amounts due them, Crowther would be unable to repay him, and declares his willingness to sell the property and divide the proceeds pro rata among the several creditors, after deducting necessary expenses, &c.

The circuit court dismissed the bill as to Crowther, and decreed that the property should be sold and the proceeds, after deducting costs, &c. to be divided pro rata among the several creditors, to secure whom it was conveyed.

It is not necessary to decide in this case, whether, if Crowther himself had sued on the bond given to him by Smith, he could have recovered more than the worth of the property, either at law or equity, for it is certain that by making that bond to Crowther, he has incurred no liability to the complainant, and the other creditors enumerated in the deed of trust, for neither at law nor equity can A. sue on a promise made by C. to B., to pay A. any sum of money, for which the obligor has received no consideration. The circuit court has in my opinion committed no error, and its judgment is therefore affirmed.

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LEVINS, and others, v. STEVENS, and others.

Levins
v.
Stevens.

Petition under the act concerning "Wills," (R. C. 1835, p. 620-1.) Petitioners set forth that they are children of A., who died leaving a will, in which no mention is made of them, and that the legacies under the will have been in whole or in part paid. They pray for a distribution "according to the usages of courts of equity, and the provisions of the statute." Demurrer to the petition sustained by the circuit court. Held, that the petition was sufficient: that the authority of the circuit court to order distribution in such cases, attaches before any distribution of the estate, and, consequently, that it was not necessary to allege in the petition that the legacies had been paid, and the estate distributed.

Appeal from the Circuit Court of Cooper county.

Adams & Hayden for Appellants.

The only question in this case is, whether the court erred in sustaining the demurrer?

To show that the court erred, the counsel for the appellants refer to the following authorities: 1 Kent. Com., 461, 2, 3, 4; Digest of Laws of Mo., 1835, page 620-1; Digest of Laws of Mo. 1825, page 795-6; Geyer's Digest, page 431.

Leonard & Miller for Appellees.

1st. The authority of the circuit court to proceed by petition, given by the statute "Wills," Rev. Stat. 621, section 33, is confined to the cases where the devisees, legatees, or heirs, have actually received more than their due proportion of the estate, and the facts stated in the present petition do not exhibit such a case.

2d. The circuit court, proceeding as a court of equity has no original jurisdiction to decree distribution of an intestate's estate.

3d. But if such jurisdiction exist, the proceeding must be by bill, and cannot be by petition. 8 Cowen Rep. 350; 10 Johnson's R. 507.

4th. If there be children not named in the will, as to them the testator is deemed to have died intestate, and such chil-

The deed of trust was made on exhibit. It was made to secure the following sums of money to the persons herein after named, viz. AUGUST TERM.
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To David Smith, the sum of	\$320	Thornton v. Smith and Crowther.
James Fryer, “	300	
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Smith made to Crowther a bond by which he bound himself to pay the above mentioned notes in consideration of being secured by the above mentioned deed of trust, and to wait with Crowther twelve months, to be reimbursed with interest, to be paid by Crowther to Smith.

Smith, in his answer admits the allegations in the bill, but states that the property conveyed to him will not produce enough to satisfy the several sums of money above mentioned, and that since the execution of the writing aforesaid, said Crowther had become insolvent, and that if he should advance to the creditors of said Crowther the several amounts due them, Crowther would be unable to repay him, and declares his willingness to sell the property and divide the proceeds pro rata among the several creditors, after deducting necessary expenses, &c.

The circuit court dismissed the bill as to Crowther, and decreed that the property should be sold and the proceeds, after deducting costs, &c. to be divided pro rata among the several creditors, to secure whom it was conveyed.

It is not necessary to decide in this case, whether, if Crowther himself had sued on the bond given to him by Smith, he could have recovered more than the worth of the property, either at law or equity, for it is certain that by making that bond to Crowther, he has incurred no liability to the complainant, and the other creditors enumerated in the deed of trust, for neither at law nor equity can A. sue on a promise made by C. to B., to pay A. any sum of money, for which the obligor has received no consideration. The circuit court has in my opinion committed no error, and its judgment is therefore affirmed.

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LEVINS, and others, v. STEVENS, and others.

Levins
v.
Stevens.

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Appeal from the Circuit Court of Cooper county.

Adams & Hayden for Appellants.

The only question in this case is, whether the court erred in sustaining the demurrer?

To show that the court erred, the counsel for the appellants refer to the following authorities: 1 Kent. Com., 461, 2, 3, 4; Digest of Laws of Mo., 1835, page 620-1; Digest of Laws of Mo. 1825, page 795-6; Geyer's Digest, page 431.

Leonard & Miller for Appellees.

1st. The authority of the circuit court to proceed by petition, given by the statute "Wills," Rev. Stat. 621, section 33, is confined to the cases where the devisees, legatees, or heirs, have actually received more than their due proportion of the estate, and the facts stated in the present petition do not exhibit such a case.

2d. The circuit court, proceeding as a court of equity has no original jurisdiction to decree distribution of an intestate's estate.

3d. But if such jurisdiction exist, the proceeding must be by bill, and cannot be by petition. 8 Cowen Rep. 350; 10 Johnson's R. 507.

4th. If there be children not named in the will, as to them the testator is deemed to have died intestate, and such chil-

dren shall be entitled to such proportion of the estate as if he had died intestate. The statute provides for the distribution of intestate's estates, but only when it shall appear from a settlement in the county court that there is a balance subject to distribution after payment of debts. See Digest of 1835, title "Wills," sec. 30; and same book, title "Administration," p. 60 and 156; do. title "Courts," sec. 15.

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Opinion of the Court by Napton, Judge.

This was a petition to the circuit court, framed under the 33d section of the act concerning Wills (Rev. C. of 1835, p. 621.) The petition sets forth that Joseph Stevens, of Cooper county, died, after having made his will, in which no mention is made of the petitioners and others, who are the children and heirs of said Stevens. The petition alleges that the legacies under the will have been in whole or in part paid. The executor, legatees, and heirs are made parties, and a contribution and distribution of the estate, according to the usages of courts of equity and the provisions of the statute, are prayed for. To this petition the defendants demurred, and the demurrer was sustained by the circuit court. The only question arising on the record is, whether the demurrer was properly sustained.

The 30th section of the act concerning Wills, (Rev. C. of 1835, p. 621,) provides that pretermitted children shall be entitled to the same proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them; and all the other legatees, devisees, and heirs shall refund their proportional part, provided such children or their descendants, so claiming, have not had an equal proportion of the testator's estate bestowed on them, in the testator's life time, by way of advancement. The 32d section provides that where a specific legacy shall be taken in execution for the payment of the testator's debts, the other legatees, devisees, and heirs shall refund their proportional part of such loss to such person from whom the bequest shall be taken. The 33d section then declares that

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"When any devisees, heirs, or legatees shall be required to refund any part of the estate received by them for the purpose of making up the share, devise, or legacy of any other legatee, devisee, or heir; the circuit court shall, upon petition of the party entitled to such contribution, and due notice given to the legatees, devisees, heirs, executors, and administrators, order a contribution and distribution of such estate, according to equity, and enforce such order with like effect as decrees of courts of equity."

Under this last section has the circuit court jurisdiction of the petition, where on its face it appears that the legacies have not been wholly paid, and consequently there may be no necessity for refunding?

The word "*received*," in this section, is relied upon to show that the legislature did not contemplate the interference of the circuit court with the question of contribution, until the executor had paid over the legacies and settled the estate, that, until this was the case, the county court had ample powers under the general provisions of law, to make distribution with an eye to this provision in our statute in favor of the pretermitted heirs. The rules applicable to the construction of statutes are well settled and not controverted here. Remedial acts are to be construed literally; every part of a statute is to be taken together, and the real intention, when it can be so ascertained from a vein of the whole act, the mischief sought to be avoided and the remedy provided, must prevail over the literal sense of terms. For this purpose not only the several parts of the same act, but previous acts, *in pari materia*, which have expired, may be resorted to, with a view to ascertain from successive and connected legislation on the subject, the real intention of the legislature. 1 Kent. Com. 462-3.

With these principles for a guide, let us examine the action of the legislature in reference to this subject.

Petition under the act concerning "Wills," (R. C. 1835, page 620-1.) Petitioners set forth that

The act of the 21st January, 1815, (Geyer's Digest 431,) after declaring that so far as pretermitted children were concerned, a testator should be considered to have died intestate, provides that "the devisees and legatees shall contribute proportionally out of the part devised or bequeathed to them

dren shall be entitled to such proportion of the estate as if he had died intestate. The statute provides for the distribution of intestate's estates, but only when it shall appear from a settlement in the county court that there is a balance subject to distribution after payment of debts. See Digest of 1835, title "Wills," sec. 30; and same book, title "Administration," p. 60 and 156; do. title "Courts," sec. 15.

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Stevens.*Opinion of the Court by Napton, Judge.*

This was a petition to the circuit court, framed under the 33d section of the act concerning Wills (Rev. C. of 1835, p. 621.) The petition sets forth that Joseph Stevens, of Cooper county, died, after having made his will, in which no mention is made of the petitioners and others, who are the children and heirs of said Stevens. The petition alleges that the legacies under the will have been in whole or in part paid. The executor, legatees, and heirs are made parties, and a contribution and distribution of the estate, according to the usages of courts of equity and the provisions of the statute, are prayed for. To this petition the defendants demurred, and the demurrer was sustained by the circuit court. The only question arising on the record is, whether the demurrer was properly sustained.

The 30th section of the act concerning Wills, (Rev. C. of 1835, p. 621,) provides that pretermitted children shall be entitled to the same proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them; and all the other legatees, devisees, and heirs shall refund their proportional part, provided such children or their descendants, so claiming, have not had an equal proportion of the testator's estate bestowed on them, in the testator's life time, by way of advancement. The 32d section provides that where a specific legacy shall be taken in execution for the payment of the testator's debts, the other legatees, devisees, and heirs shall refund their proportional part of such loss to such person from whom the bequest shall be taken. The 33d section then declares that

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"When any devisees, heirs, or legatees shall be required to refund any part of the estate received by them for the purpose of making up the share, devise, or legacy of any other legatee, devisee, or heir, the circuit court shall, upon petition of the party entitled to such contribution, and due notice given to the legatees, devisees, heirs, executors, and administrators, order a contribution and distribution of such estate, according to equity, and enforce such order with like effect as decrees of courts of equity."

Under this last section has the circuit court jurisdiction of the petition, where on its face it appears that the legacies have not been wholly paid, and consequently there may be no necessity for refunding?

The word "*received*," in this section, is relied upon to show that the legislature did not contemplate the interference of the circuit court with the question of contribution, until the executor had paid over the legacies and settled the estate, that, until this was the case, the county court had ample powers under the general provisions of law, to make distribution with an eye to this provision in our statute in favor of the pretermitted heirs. The rules applicable to the construction of statutes are well settled and not controverted here. Remedial acts are to be construed literally; every part of a statute is to be taken together, and the real intention, when it can be so ascertained from a vein of the whole act, the mischief sought to be avoided and the remedy provided, must prevail over the literal sense of terms. For this purpose not only the several parts of the same act, but previous acts, *in pari materia*, which have expired, may be resorted to, with a view to ascertain from successive and connected legislation on the subject, the real intention of the legislature. 1 Kent. Com. 462-3.

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The act of the 21st January, 1815, (Geyer's Digest 431.) after declaring that so far as pretermitted children were concerned, a testator should be considered to have died intestate, provides that "the devisees and legatees shall contribute proportionally out of the part devised or bequeathed to them

by the said will and testament, and the circuit court shall have power to order and decree a distribution of such estate according to the true meaning of this act.

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It will be observed, that at the time of the passage of this act, the circuit court was the tribunal for transacting probate business, and it was unnecessary to point out any specific mode by which the rights secured under that act were to be enforced. There could be no conflicting claim to jurisdiction, and the circuit court, being also the probate court, would enforce the remedy as it could any other matter relating to last wills and testaments.

they are children of A., who died leaving a will, in which no mention is made of them, and that the legacies under the will have been in whole or in part paid. They pray for a distribution "according to the usages of courts of equity and the provisions of the statute." Demurrer to the petition sustained by the circuit court. Held, that the petition was sufficient. That the authority of the circuit court to order distribution in such cases, attaches before any distribution of the estate, & consequently that it was not necessary to allege in the petition that the legacies had been paid, and the estate distributed.

At the revisal of the laws in 1825, when county courts were invested with this probate jurisdiction, and the legislature were about re-enacting the same provision to secure the rights of pretermitted heirs, it became necessary for them to determine whether these rights should be left to the county court, which they had made the appropriate and peculiar tribunal to settle controversies of this kind, or should still be retained in the circuit court. The act of the 19th February, 1835, was passed, which is substantially the same as the present law. By that act the circuit court, upon petition, has power to order and decree a contribution and distribution of the estate, when any legatees or devisees shall be required to refund any part of the estate received by them. Now it seems reasonable to me, that if the legislature intended to divest the jurisdiction of the circuit court, or to place it on different grounds from where it stood in 1815, they would surely have resorted to some more plain and obvious mode than the substitution of the word "*received*," for the words "*devised or bequeathed*."

The framers of that act, we may presume, were aware that the county court, among its general powers and duties, had the right to compel a distribution of a decedent's estate according to law. They must have been equally well aware, that after a distribution had been made and the property had passed from the hands of the executor or administrator into those of the distributees, heirs, and devisees, the circuit court, as a court of chancery, could enforce the rights of omitted heirs.

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If therefore the remedy they devised be, as is contended here, only to be exercised by the circuit court after a complete distribution of the estate, it would be entirely superogatory. It would be allowing the parties to effect by a petition, what the already had the power to attain by a *bill*.

It must be borne in mind, in searching for the intent of the legislature in the passage of the several acts on this subject, that this restriction upon the power of testators, was unknown to the common law, and I believe, almost entirely peculiar to our own statutes. It was proper that a specific remedy should be pointed out, and a tribunal selected to enforce that remedy with an eye to the importance and novelty of the provision. It would not have been prudent to leave this matter amidst the mass of general powers and duties assigned to the county and chancery courts. The same act therefore which gave the right, pointed out the remedy—a remedy designed at least to be peculiar and appropriate, if not to the exclusion of all other remedies previously existing.

The demurrer, in my opinion, was improperly sustained. Judgment reversed, and cause remanded.

POSEY V. GARTH.

If a person retain a servant for a year at wages, the performance of the service is a condition precedent to the payment of wages, and the servant cannot recover them before he has performed the years' service. If he is prevented by his employer from fulfilling his contract, and is wantonly and without sufficient cause discharged before the expiration of the period for which he was hired, he is entitled to the wages for the whole period he was to serve: but if there is any fault or misconduct in him towards his employer sufficient to warrant his discharge, and in consequence thereof he is driven from the service of the person by whom he is hired, he is not entitled to any wages.

FIRST JUDICIAL DISTRICT.

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Appeal from the Howard Circuit court,

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Clark for Appellant.

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1st. That where there is a contract to perform labor for a specified length of time, or do a particular act, and the party undertaking to do the act or perform the labor is prevented from doing so by the party employing him, he may sue and recover the full amount of the contract. 3 Mo. Rep, 230; 4 Mo. Rep. 41.

2d. That in contracts like the present, the party discharging the other cannot, when sued, excuse himself upon the ground that the party discharged had or was about to do an injury to his property, but must bring his action for the injury, if any is done.

3d. That in all cases where the subject matter of the controversy is properly cognizable in the circuit court, costs must be adjudged to the one recovering, however small that recovery may be. Rev. Statutes, act relating to costs, 5th and 14th sections; Talbot v. Grun, 6 Mo. Rep. 458.

Davis for Appellee.

Defendant contends that the evidence was properly given to the jury, and that the instruction was correct.

Defendant also contends that the costs of suit was properly adjudged against the plaintiff, as the finding was below the sum of ninety dollars. See Jones & Jones v. Relfe, Adm'r. 5 Mo. Rep. 542; Rev. Code, title Costs.

Opinion of the Court by Scott, Judge.

Bird Posey was employed by Dabney Garth, as overseer, for one year, at the price of one hundred and seventy-five dollars; his term of service commenced on the 1st January, 1838, and he continued industriously employed for Garth until sometime in April following, when Garth told Posey that he must leave his service, that he had been negligent, and had maltreated and injured his negroes: Thereupon Posey left Garth's employment. It appears that Posey, the

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day before he was ordered to leave Garth's service, for some fault supposed to have been committed by one of Garth's negroes under his control, attempted to punish the negro by whipping; the negro, the bill of exceptions states, resisted by refusing to obey Posey's order. Posey thereupon struck the negro with a handspike and knocked him down, and then beat him with the handspike in such a manner that in four days thereafter he died from the effect of the blows. Posey afterwards instituted an action against Garth for his year's wages, claiming the whole amount, and recovered sixty-one dollars, the costs being adjudged against him. A new trial was asked for by Posey, and refused, and he brings this cause here by appeal. Under this state of facts is he aggrieved by the judgment of the court below?

If a person retain a servant for a year at wages, the performance of the service is a condition precedent to the payment of wages, and the servant cannot recover them before he has performed the year's service. If he is prevented by his employer from fulfilling his contract, and is wantonly and without sufficient cause discharged before the expiration of the period for which he was hired, he is entitled to the wages for the whole period he was to serve: but if there is any fault or misconduct in him towards his employer sufficient to warrant his discharge, and in consequence thereof he is driven from the service of the person by whom he is hired, he is not entitled to any wages. Reciprocal justice requires that such should be the law of contracts, of this character: if it were otherwise, then while the employer is bound by his contract to retain the servant, although it may be against his inclination, for the whole period of his service, or pay him the whole wages, the servant by his misconduct may compel his employer for his own security to discharge him, and then recover wages for the term he has served. So while the contract is binding on the employer, the servant is bound or not, at his option. Such a construction of the contract would encourage fraud and wickedness in servants, and induce them, whenever their inclination prompts to be guilty of such enormities as will compel their discharge. Justice Laurence remarked, in the case of *Cutter v. Pos-*

ver, 6 Term. R. 327, that a servant, although hired in a general way, is considered to be hired with reference to the general understanding on the subject, that the servant shall be entitled to his wages for the time, though he does not continue in the service during the whole year. This remark of the learned judge, torn from its context and placed in some elementary works, has been made to give countenance to the idea, that if there is a termination of the service by the fault of the servant before the time agreed on, the servant is entitled to wages for the time he served, when it is obvious the judge was speaking of the termination of the contract without the fault of the servant, for it is observable that this principle was stated in a case which the court unanimously held, that if a sailor hired for a voyage, take a promissory note from his employer for a certain sum provided he proceed, continue and do his duty on board for the voyage, and before the arrival of the ship, he dies, no wages can be claimed either on the contract or on a *quantum meruit*. This case however was decided on the peculiar nature of the contract, and is not to be regarded as an authority in support of the doctrine, that if a servant who is hired for a year die in the middle of it, his executor cannot recover part of his wages in proportion to the time of service. This was the old law, it is otherwise now. AUGUST TERM, 1841.

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his employer
sufficient to
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to any wages.

Was the conduct of Posey such as to warrant his discharge? Have mercy and humanity left this earth, that this question should be asked? Could Garth as a master owing protection to his slaves, any longer retain such a man in his service, he not only had a right to discharge him, but it was his duty to do it. A mere disobedience of orders seems to have been the fault of the negro; for although the record states that the negro resisted, yet it appears that his resistance consisted in disobeying orders, and that too when he was about to be whipped. Should one retain in his employment another, who for such a provocation would with a handspike knock down his slave, and then continue his blows until they caused his death?

As it regards the question of costs, inasmuch as the plain-

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tiff was not entitled to recover any thing, he cannot complain that they were adjudged against him, and as the defendant does not seek to reverse the judgment, let it be affirmed.

ASHLEY and others v. CRAMER.

1. In 1799, Pierre Chouteau petitioned the Lt. Gov. of Upper Louisiana to grant him 30,000 arpents of land on the Missouri river, 60 miles above the mouth of the Osage, so as to include the river Lamine, and some salt springs. De Lassus, the Lt. Gov. granted the petition on the 20th Oct. 1799, and directed that the surveyor general should survey the land when Chouteau desired it, reserving the right of the Intendant General to confirm the title. Held: That this concession of the Lt. Gov. was a permission to Chouteau to appropriate the said land, and could not effect a severance of the land specified, from the King's domain, until an actual survey was made, as the survey alone appropriates land. This concession or grant, without any survey under the Spanish authorities, is not such a grant as is contemplated by our act regulating the action of ejectment.
2. The action of the board of commissioners, under the act of congress of July 9th, 1832, recommending this claim for confirmation, is not such "a confirmation made under the laws of the United States," as is contemplated by the statute of the State regulating the action of Ejectment. That board had no power to confirm any claim whatever. The action of the board, however, upon this claim, comes within the meaning of the 7th section of the act concerning evidence.
3. The plaintiffs, to bring their claim within the provisions of the act of congress of July 4, 1836, confirming the proceedings of the board of commissioners, offered in evidence extracts from the minutes of the board, containing their proceedings on this claim in 1833, certified by the recorder of land titles to be truly transcribed from the minutes of the board, and on file and of record in his office. Held, that as this evidence did not show under what power the commissioners acted, or whether this was one of those decisions reported to the general land office, the proof was of too loose and indefinite a character to raise even a presumption in favor of the claim of the plaintiffs, and it was therefore properly considered by the circuit court as insufficient to make out a confirmation under the laws of the United States.
4. The act of congress of July 4, 1836, is a legislative grant, and parts with all the interest of the United States in the confirmed claims. This legislative grant or confirmation is equivalent to a patent, and requires no further action on the part of the United States to perfect the title. The entire and absolute property passes from the general government and vests in the confirmees, by virtue of the act.

5. The act of July 4, 1836, makes no provision for issuing any patent, or other evidence of title, to the claimants under that act, and there being no law of the general government authorising the issuing of such patents, the patents issued to claimants under said act are void.

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Error from the Cooper Circuit Court.

Todd & Adams for Plaintiffs.

1st. That the court erred in rejecting the original grant as incompetent evidence to go to the jury.

2d. The notice of claim to the land mentioned in the concession, and the proceedings had before the board of commissioners, commencing with the notice of claim and ending with a confirmation of the claim, was competent proof to go to the jury, and the court erred in rejecting it. 1 Missouri R. 777; 4 M. R. 450; act of congress "for the final adjustment of private land claims," approved 2d July, 1832; the supplementary act, approved 2d March, 1833; act of 4th July, 1836. See also the several acts of this State concerning evidence.

3d. The certified copy of survey by the U. S. surveyor, of the land in the concession, to Piere Chouteau, was competent proof, taken in connection with the grant, and the confirmation by the board of commissioners.

4th. The grant—confirmation by the board of commissioners—the survey and the act of congress of 4th July—'36, taken in connection, were competent proof, and the court erred in rejecting them.

5th. The patent issued by the U. S. was competent proof and sufficient to authorise a recovery. 13 Peters' R. 516; ib. 450-6; Cowen's R. 282-3; 10 J. R. 25; 12 J. R. 81.

6th. If any part of the evidence offered was competent to go to the jury, the court erred in refusing to grant a new trial.

Leonard & Hayden for Defendants.

1st. The Spanish concession is, neither, First a legal title to a specific piece of land; nor, Second, Such a title as, un-

AUGUST TERM, 1841. der our statute, will support an action of Ejectment. Rev. Stat. Mo. "Ejectment," sec. 2d.

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2d. The confirmation of November, 1833, even if connected with the survey given in evidence, (and of such connection there was no proof,) is neither, First, a legal title; nor, Second, Such an equitable right as under our statute will support an action of Ejectment. Rev. Stat. Mo. "Ejectment," sec. 2d.

3d. The patent is void, because issued without any authority of law. Act of congress of 9th July, 1832; U. S. Land Laws, 1 vol. 505; act of congress of 2d March, 1833; U. S. Land Laws, 1 vol. 518; act of congress of 4th July, 1836; U. S. Land Laws, 1 vol. 557; Att. Genl. opinion Aug. 8th, '38; U. S. Land Laws, 2d vol. 1042; Polk's Lessee v. Windle, et al. 3 Peters' Con. U. S. R. 292; Doc. ex dem., Patterson v. Winn, 11 Wheat. 380, 6 Con. R. 357; Jackson v. Lawton, 10 J. R. 26.

4th. Although the act of the 4th of July, 1836, be a statute grant, yet there was no evidence in the cause showing that this claim was one of those embraced by that statute; acts of congress of 9th July, '32; 2d March '33; and 4th July, '36; 1 vol. U. S. Land Laws, 505, 518, 557; Lucas v. Strother, 12 Peters' U. S. Rep. 410.

Opinion of the Court by Napton, Judge.

This was an action of ejectment brought by plaintiffs to recover a tract of land in Cooper county. Upon the trial, the plaintiff submitted a series of title papers, on each of which they separately relied, and which were successively rejected by the court. The plaintiff then relied upon the whole conjunctively, and the court considered them insufficient evidence of title. A non-suit was submitted to, and a motion made to set the same aside, which was overruled by the court. The following was the evidence:

1st. A certified copy of a concession to Piere Chouteau, upon an application or petition to the Lt. Governor. The petition of Chouteau sets forth his desire that the Lt. Gov.

would grant him 30,000 arpents of land on the Missouri river, 60 miles above the mouth of the Osage, so as to include the river Lamine, and some salt springs which he designed to work. De Lassus on the 20th Oct. 1799, grants the petition of Mr. Chouteau, and directs that the surveyor, Soulard, should survey the land when Mr. Chouteau desired it, reserving, however, as usual, the right of the Intendent General to confirm the title.

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2d. A copy of the proceedings of the board of commissioners in 1800, containing notice of the claim contained in the concession, copy of the concession, and a document purporting to be an assent on the part of the Osage Indians to the occupancy of the land by Mr. Chouteau. Also the proceedings of the board in 1833, confirming the claim. The following is the certificate of the recorder of land titles:

"Recorder's Office St. Louis, Missouri, June 17, 1839.

I certify the first part of the foregoing, (being the notice to the recorder of land claims,) to be truly transcribed from Book D, page 152, the 2d and 3d parts, (being the assent of the Osage Indians, and the petition and grant,) to be truly copied from the original documents on file—and the balance to be truly transcribed from the minutes of the commissioners—all on file and of record in this office.

F. R. CONWAY, U. S. Recorder of D. & C."

3d. The act of congress of 4th July 1836, confirming certain claims to land, and a survey made subsequent to said act.

4th. A patent for the land confirmed by said act of 4th July, 1836.

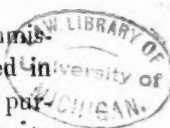
Evidence was given of the conveyance from Chouteau to Ashley, the death of Ashley, and then, heirship of the present plaintiffs.

This evidence the circuit court rejected severally and collectively, as insufficient to maintain the action.

I will consider the evidence in detail, as it was presented to the circuit court.

The concession, or grant of De Lassus in 1799, was a permission to Chouteau to appropriate 30,000 arpens of land on the Missouri river, 60 miles above the mouth of the

In 1799, P. Chouteau petitioned the lt. gov. of Upper Louisiana to grant him 30,000 arpents of land on the Mo. river, 60 miles above the mouth of the Osage, so as to include the river Lamine and some salt springs. De Lassus, the lt. gov. granted the petition on the 20 Oct. 1799, and directed that the surveyor general should survey the land when Chouteau desired it, reser-



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ving the right of the Intendant general to confirm the title. Held, that this concession of the lt. gov. was a permission to Chouteau to appropriate the said land, and could not effect a severance of the land specified from the King's domain, until an actual survey was made, as the survey alone appropriates land. This concession, or grant, without any survey under the Spanish authorities, is not such a grant as is contemplated by our act regulating the action of Ejectment.

This permission, or warrant of survey, did not purport to be a grant, and could not be construed to effect a severance of the land specified, from the King's domain, until an actual survey was made. The survey alone appropriates the land. Taylor & Ourly v. Brown, 5 Cranch, 234. This paper, therefore, was not such a grant as is contemplated by our act regulating the action of ejectment, and consequently did not of itself make out the plaintiff's right of recovery.

The proceedings of the board of commissioners in 1833, by which the claim of Chouteau was recommended for confirmation, constitutes the second step taken in the court below, and involves the question whether the action of this board was such as is contemplated by our statute, "a confirmation under the laws of the United States," sufficient to maintain ejectment. The act of July 9th, 1832, for the final adjustment of private land claims in Missouri, makes it the duty of the recorder and the two commissioners joined with him, to examine all the unconfirmed claims to land in that State, which had been legally filed; and to class the same, so as to show, first, what claims in their opinion would have been in fact confirmed, according to the laws, usages and customs of the Spanish government, had the same continued; and secondly, what claims, in their opinion, are destitute of merit, in law or equity, under such usages and customs.

The recorder and commissioners were further directed, at the commencement of each session of congress, to lay before the commissioner of the general land office a report of the claims so classed, stating the date and quantity of each, whether there be any, and what conflicting claims, and the evidence upon which each depended, to be laid before congress for their final decision upon the claims contained in such first class. By the act of March 2, 1833, two years additional time was allowed the recorder to take testimony.

That the action of this board of commissioners in 1833, on the claim of Chouteau, was such a confirmation as comes

within the meaning of our act concerning evidence, (Rev. AUGUST TERM, 1841. C. 1835, p. 251, s. 7,) I entertain no doubt. In the case of *George v. Murphy*, (1 Mo. Rep. 770,) the court gave this construction to a confirmation made by the recorder under the act of 2d August, 1813. But the act of our legislature, regulating the action of ejectment, authorises that action to be maintained on a confirmation made under the laws of the United States. Is this such a confirmation? It is clear from the terms of the act, that this board erected under the act of July 9, 1832, had no power to confirm any claim whatever. Their duty was merely to divide the unconfirmed claims into two classes, the one embracing such as in their estimation appeared equitable, and the other such as had no merit in law or equity, and to report the first class of claims to the commissioner of the general land office for the subsequent action of congress. Had the board confirmed any claims under this act, their action would have been entirely beyond their powers, and of course a mere nullity.

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The act of July 4, 1836, makes no provision for issuing any patent, or other evidence of title, to the claimants under that act, and there being no law of the general government authorising the issuing of such patents, the patents issued to claimants under said act are void.

But they did not undertake to confirm. The extract from the minutes of the board, given as evidence, shows a mere expression of opinion that the claim should be confirmed. This was no *confirmation*, therefore, under any law of the United States, and of itself could not make out the plaintiff's title.

The act of July 4, 1836, was then read in evidence to show a confirmation under the laws of the United States. That act declares "that the decisions in favor of land claimants, made by the recorder of land titles in the State of Missouri, and the two commissioners associated with him by virtue of an act entitled 'an act for the adjustment of private land claims in Missouri,' approved July 9th, 1832, and an act supplemental thereto, approved March 2d, 1833, as entered in the transcript of decisions transmitted by the said recorder and commissioners, to the commissioners of the general land office, and by him laid before congress at the two last and present sessions, be and the same are hereby confirmed, saving and reserving, however, to all adverse claimants, the right to assert the validity of their claims in a court or courts of justice." The act proceeds to make ex-

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The plaintiffs, to bring their claim within the provisions of the act of congress of July 4, 1836, confirming the proceedings of the board of commissioners, offered in evidence extracts from the minutes of the board, containing their proceedings on this claim in 1833, certified by the recorder of land titles to be truly transcribed from the minutes of the board, and on file of record in his office. Held, that as this evidence did not show under what power the commissioners acted, or whether this was one of those decisions reported to the general land office, the proof was of too loose and indefinite a character to raise even a presumption in favor of the claim of the plaintiffs, and it was therefore properly

ceptions of certain claims therein enumerated, of which the present claim is not one.

To bring the present claim within the provisions of this act, it must appear to be one of those claims reported favorably on by the recorder and commissioners, who acted by virtue of the two acts above enumerated, and entered in the transcript of decisions transmitted by the said recorder and commissioners, to the commissioner of the general land office, and by him laid before congress. For this purpose the plaintiffs presented extracts from the minutes of the commissioners, containing their proceedings on this claim in 1833, certified by the recorder of land titles to be truly transcribed from the minutes of the board, and on file and of record in his office. The evidence was undoubtedly good as far as it went, but there is nothing to show under what power these commissioners acted, or whether it was one of those decisions reported to the commissioners of the general land office. Where duties are enjoined by law on public officers, the presumption is certainly that those duties have been performed, and the very strictest proof would not, and should not be required in cases like the present. But a prima facie case, at least, must be made out. No presumption legally arises, that this board had no subsequent action upon the claim after the date of the proceedings copied; and it should, at all events, have appeared from the certificate of the recorder or otherwise, under what law of the United States or authority, this board acted. The proof is of too loose and indefinite a character to raise even a presumption in favor of the plaintiffs, and was therefore properly considered by the circuit court as insufficient to make out a confirmation under the laws of the United States.

The last little paper we are called on to consider, is that patent offered by the plaintiffs, under the seal of the general land office. The act of 4th July, 1836, is a legislative grant, it parts with all the interest of the United States in the confirmed claims.

This legislative grant or confirmation has been held equivalent to a patent, and requires no further action on the part of the federal government to perfect the title. The

entire and absolute property passes from the grantors and vests in the grantees by virtue of the act, as much so as if a patent had issued. Such has been the construction given to similar acts by this court, and the supreme court of the United States, in numerous and repeated cases. *Vapur v. Benton*, Mo. Rep.; *Tatter v. Primm*, Mo. Rep.; *Strother v. Lucas*, Peters' Rep. The wisdom or propriety of these decisions, it would be useless now to discuss. Whether under this adjudicated opinion of these legislative grants, congress could provide further and additional evidences of title, may very well be questioned. The question did arise under the act of 13th June, 1812, and 26th April, 1824, in the case of *Gurno v. Administrator of Janis*, and a majority of the court in that case held, that congress might provide the means of furnishing evidence of title to the claimants under those acts. The matter was much discussed, when that case came up a second time in this court, and only one judge expressed any opinion on that point. *Gurno v. Janis' Administrator*, (6 Mo. R. 330.)

It is not necessary to decide the question in this case. Congress made no such provision in the act of 4th July, 1836, or subsequently, that I am a prised of, for issuing any patent or other evidences of title to the claimants under that act. Nor has any authority, under any general law of the United States, been shown for issuing this patent. Without such authority, it is no better than blank parchment. *McConnell's lessee v. Wilcox*, 13 Peters.

The circuit court did not, for the reasons above mentioned, err either in rejecting the several evidences of title offered by the plaintiffs, separately, or conjunctively, and its judgment is affirmed.

Tompkins, Judge.

I concur in affirming the judgment of the circuit court, because the recorder's certificate does not show that this claim was one acted on under the laws of 1832 & 33. I am not well informed as to the validity or invalidity of the pa-

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considered by the circuit court as insufficient to make out a confirmation under the laws of the U. States.

The act of congress of July 4, 1836, is a legislative grant, & parts with all the interest of the United States in the confirmed claims. This legislative grant or confirmation is equivalent to a patent, and requires no further action on the part of the U. States to perfect the title. The entire and absolute property passes from the general government and vests in the confirmation, by virtue of the act.

The action of the board of commissioners, under the act of congress of July 9, 1832, recommending this claim for confirmation, is not such a confirmation made under the laws of

AUGUST TERM, 1841. tent, but am decidedly of opinion that there has been no title shown previous to the patent, on which the action of eject-

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v.

Cramer.

the United
States," as is
contemplated

ment can be sustained under our statute.

Scott, Judge.

I concur in the opinion of Judge Napton.

by the statute of the State regulat'g the action of Ejectment. That board had no power to confirm any claim whatever. The action of the board, however, upon this claim, comes within the meaning of the 7th sec. of the act concerning evidence.

BRYAN V. JAMISON.

In Chancery. Defendant sold a lot of ground to A. and gave his bond for a conveyance on payment of the purchase money. Subsequently a judgment was rendered against A. on his note to B., in which defendant was security. An execution was issued against A. on the judgment, and defendant knowing himself to be ultimately bound for the debt, and being informed that no property belonging to A. could be found, desired the sheriff to levy the execution on said lot, and that defendant would see that the title should be made good to the purchaser. Complainant relying on the promise of defendant, became the purchaser of the lot at sheriff's sale. Complainant prayed for a conveyance of the legal title, refusing to pay to defendant the purchase money, or any part thereof due defendant by A. Held: that the promise of defendant, being verbal, was within the statute of frauds, and that complainant could not obtain a conveyance of the legal title without paying to defendant the purchase money.

Appeal from the Boon Circuit Court.

Kirtley for Appellant.

1st. That Jamison brought the lot into market by showing it to the sheriff as Donohoe's. He induced the sale, and consequently the purchase by the complainant, and cannot now defeat his title. See Fonblanque's Equity; 3 Littel, 55; Springle & Bobb's heirs v. Morrison, 351; Harrison & Gray v. Edwards, 4 Monroe, 196; 2 Starkies' R. 841; 1 J. C. C., 354; J. J. Marshall, 36; 3 Monroe, 515; 1 J. J. Marshall, 216; 5 Monroe, 437.

The case is not within the statute of contracts and promises. 3 Littel 55; Bobbs heirs v. Morrison; 1 J. C. R. 352. AUGUST TERM,
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To prove the position, averments of Jamison inducing the purchase and sale of the lot, not directly denied by the answer, one witness is sufficient. 3 Monroe, 225; 6 Monroe, 22; 4 Monroe, 176; 1 Bibb, 290; 4 Bibb, 357; Lawrence & Lawrence.

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v.
Jamison

Hayden for Appellee.

1st. That by the purchase of the lot under the sheriff's sale, the complainant derived no better title to the lot than Donohoe had to it, and that as Donohoe could not have compelled a conveyance of the lot from Jamison without having paid the consideration money to Jamison, which he Donohoe, had agreed to pay him for it, that therefore complainant could not enforce the conveyance without having paid it, or offered to do so prior to the filing of the bill.

2d. The complainant cannot demand a decree for the conveyance of the lot upon the testimony of Maupin, for two reasons: 1st. Because at best it showed nothing but a parol license or authority from Jamison to Maupin to sell the lot under the execution, and therefore not binding upon him by reason of the statute of frauds and perjuries, which is relied on by him. 2d. Because the authority so to sell it Jamison claims in his answer, and the answer stands opposed alone by the testimony of Maupin. And, as a third reason, Maupin does not pretend in his deposition that he sold the lot *as the lot of Jamison*, under the license, but that he sold it as the lot of Donohoe, under and by virtue of the execution.

3d. That in this case the court cannot, and will not, reverse the judgment of the circuit court, because the complainant acquiesced in the decree of the circuit court, and did not move for a rehearing, or a new trial of the cause, and therefore this court ought to affirm the judgment or dismiss the appeal. See Woodson, administrator of McClelland, and others, 4th Mo. R. p. 495, 504.

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Bryan, in his bill, states that in February, 1833, an execution issued from the circuit court of Boone county in favor of Garton B. Maupin, against William Donohoe, which was levied on lot No. 279, in the town of Columbia, as the property of the said Donohoe, and the same was sold by virtue of said execution, on the 26th day of June, 1833, and that he became purchaser, and that Jamison, the defendant in this suit, sets up a claim to the said lot; and that before the sale of the lot on execution, Jamison had sold the lot to Donohoe, and received payment, and executed his bond to said Donohoe for a title; that Jamison was equally with said Donohoe bound to said Maupin for the debt for which the aforesaid execution issued, though the judgment had not been obtained against him, and that Jamison knowing himself to be ultimately bound for the amount of the debt, and being informed that property belonging to Donohoe could not be found, desired the sheriff to levy the execution on said lot as the property of Donohoe, and that he would see that the title should be made good to the purchaser; and that the levy was made in pursuance of such his advice, and the complainant became purchaser as above stated, confiding in this promise of Jamison through the sheriff, who said Jamison had authorized him to make such statement. That before Donohoe had become indebted to Maupin, Jamison had sold this lot to Donohoe; and that the said Donohoe became indebted to Maupin in the manner following, to wit: That after Donohoe became indebted to Jamison for the lot, Jamison on some account became indebted to Maupin, who pressing Jamison for money, Jamison demanded of Donohoe pay for the lot; that Donohoe thereupon applied to Maupin to borrow one hundred dollars for Jamison; that Maupin informed Donohoe the money Jamison wanted was for him, and that he could make the arrangement with Jamison, and let Donohoe have the benefit of that arrangement: that Maupin, Donohoe and Jamison came together: that Maupin cancelled one hundred dollars of the debt that Jamison owed him at that time, and then loaned as much money

to Donohoe, taking Jamison as security for Donohoe in a ^{AUGUST TERM,} note for that sum; and that the debt thus contracted by Donohoe, is the same for which the lot was sold: that thus Bryan contends, Jamison has received from Donohoe one hundred dollars of the purchase money of the lot sold as aforesaid: that after he, the complainant had purchased the lot, and learned the situation thereof, he, to avoid further difficulty, had made to Jamison a tender of fifty dollars as the balance of the purchase money of the lot, being informed that it had been sold to Donohoe for one hundred and fifty dollars; but that he, the complainant, is not now willing to pay that price for the perfection of his title to said lot; but he contends that said Jamison, after his direction to the sheriff to levy on said lot, and his declaration that he would make the title good to the purchaser, is now bound in equity to make a good title thereto. Donohoe was subsequently made a party to this bill, and not appearing, a decree was entered up against him.

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Jamison answered, stating that he knows nothing of the statements made by the sheriff when this lot was exposed to sale: he admitted that he had told the sheriff that he was bound to pay the debt for which the said sheriff was about to sell the said lot; he states that he was not himself present at the sale, that he does not know whether the complainant was present when the sheriff made such statements and was influenced by them: he admits that he pointed out the lot to the sheriff, and requested it to be sold on the execution: the defendant insists on the statute of frauds in relation to verbal agreements or promises concerning the sale of lands, and he denies that the sheriff had any authority to make any promise binding on him concerning the sale of said lot. The defendant admits the statement of the manner in which Donohoe became indebted to Maupin to be correct; and that he gave Donohoe a credit on his obligation for the purchase for the sum of one hundred dollars, the amount borrowed for his use by Donohoe from Maupin.

The sheriff stated that Jamison requested him to levy on the lot in question, stating that he did not wish Donohoe to

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In chance-
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sold a lot of
ground to A.
and gave his
bond for a
conveyance
on payment
of the pur-
chase money.
Subsequently
a judgment
was rendered
against A. on
his note to B.
in which de-
fendant was
security. An
execution was
issued against
A. on the
judgment, &
defendant
knowing him-
self to be ulti-
mately bound
for the debt,
and being in-
formed that
no property
belonging to
A. could be
found, desired
the sheriff to
levy the exe-
cution on said
lot, and that
defendant
would see
that the title
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be put to jail, and said if the sheriff would sell it he would see a good title should be made for it.

The circuit court dismissed the bill of the complainants, and his counsel contend that the decree ought to be reversed: because, say they, Jamison is in the situation of a man who stands by and sees another sell his property, and does not disclose his better claim; and courts of equity from time immemorial, have decreed that proprietors of real property, who silently stand by and see their lands disposed of by those who have no title, shall not afterwards be admitted to set up their claims against such purchasers. They admit that Bryan, having purchased this lot with the knowledge that the purchase money had not been paid to Jamison by Donohoe, must have held it subject to Jamison's lien, but for the inducements which he held out to Bryan, through the sheriff, to purchase the lot: but those inducements being held out, they contend that Jamison should have been decreed by the circuit court to convey. No body will deny that the law relied on by the counsel of Bryan is good law; but it is not so obvious that it suits the case: Jamison was so far from standing by and witnessing the sale of his lot by Donohoe, that he does not appear to have been present. So far was he from concealing his title, that he appears to have been industrious in making it known that he had a lien on the lot, although he was not present.

Donohoe undoubtedly had such an interest in this lot as might have been sold on execution; (see section 16th of the act concerning executions, p. 236, of the digest of 1835;) and if Bryan had prayed that the property be decreed to him on paying the purchase money with the interest due to Jamison, he might have succeeded, provided he could have presented himself in a court of equity in a proper light.

The promises alleged to have been made by the sheriff in the name and at the request of Jamison, could not have had much influence on the by-standers, when none of them could bid more than two dollars and fifty cents for a lot which it is in evidence had been sold some years before for more than one hundred and fifty dollars, in what, we know, to be a thrifty village, in the most fertile and best cultivated

tract of country on the Missouri river, and those promises were clearly within the statute of frauds. As the case is presented in the present bill, Bryan declares his unwillingness to pay to Jamison even the remainder of the purchase money, and the interest due, and a court of equity would perhaps do Jamison an injury to give him a tenant in common in this lot, in consideration of so small a sum paid. It is true, that, in strictness, Jamison, by procuring his own debt to Maupin to be cancelled, and by becoming security for Donohoe in the same amount to Maupin, and then by entering on Donohoe's bond for the purchase money, a credit for that sum, lost the lien on the lot for that amount: but no court of equity could deprive him of that lien in favor of Donohoe laying claim to no higher merit than he displays on this record. No property of his is to be found as appears in evidence; and Jamison is only nominally paid the sum of one hundred dollars. He is not sued jointly with Donohoe, but if he does not pay the judgment with the accumulation of costs, &c., without suit, he will be liable to be sued by Maupin. It cannot be that inadequacy of price alone is a badge of fraud, but where property sold as low as this did, it seems that Bryan comes with a very ill grace into a court of equity, charging Jamison with unfairness because he will not release his lien on the lot for the purchase money. The utmost favor Bryan could expect a court of equity to decree him, would be a title to the lot after paying all the money Donohoe would have been liable to pay, together with the interest due on the purchase money, deducting the sum of one hundred dollars nominally paid by Donohoe to Jamison. The circuit court, as it appears to me, committed no injury on Bryan by dismissing his bill, except that it dismissed it generally. It should have been dismissed without prejudice. Such is the opinion of all the members of this court. Its decree then will be reversed as to that matter, and the bill is hereby dismissed from this court without prejudice to Bryan in any further suit for the same cause; and he is decreed to pay the costs both of this court and of the circuit court.

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the legal title, refusing to pay to defendant the purchase money, or any part thereof due defendant by A. Held, that the promise of defendant, being verbal, was within the statute of frauds, and that complainant could not obtain a conveyance of the legal title without paying to defendant the purchase money.

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HATFIELD V. WALLACE.

 Hatfield
v.
Wallace.

1. In every case in which the action for a forcible detainer is given by the statute, the person to whom the action is given is supposed to have been in possession of the premises, and the defendant to have come into the possession under him, either immediately or mediately. A purchaser at sheriff's sale, who has never been in possession, cannot maintain this action.
2. An improvement on public lands is not subject to execution. It is not such an interest in land as is contemplated by the act regulating executions.

Appeal from the Morgan Circuit court.

Wilson for Appellant.

The only point in the case is, whether an improvement on public lands is subject to execution? We contend that it is, and cite Laws of Mo. 260, sec. 17; 262, sec. 59; 281, sec. 28, and 2 B. Com. 196-280. sec. 25.

Hayden for Appellee.

1st. That the property sold under execution was not subject to the sale, and therefore the plaintiff by the purchase obtained no right thereto.

2d. That if it were subject to sale, the record preserved was not proper for the recovery of it.

Opinion of the Court by Tompkins, Judge.

This action was brought by Hatfield against Wallace before a justice of the peace. The justice's judgment being for the defendant Wallace, Hatfield appealed to the Circuit court, and that court also giving its judgment for Wallace, Hatfield appealed to this court.

The action was for a forcible detainer. The facts of the case as agreed on by the parties are these: that Wallace some few years since made an improvement upon public lands in Morgan county, to which he had no claim save that of occupancy, and the value of his improvement thereon, (the land and place in controversy,) that the same was le-

vied upon by the sheriff of Morgan county by virtue of an execution against the defendant, and being sold was purchased by the plaintiff, and that the plaintiff made a demand in writing of the said land, and that it was refused. The third section of an act concerning forcible entry and detainer provides that when any person shall wilfully and without force, hold over any lands, tenements, or other possessions, after the termination of the time for which they shall have been let to him, or the person under whom he claims, or shall lawfully and peaceably obtain possession, but shall hold the same unlawfully and by force, and after demand made in writing for the deliverance of the possession thereof, by the person having the legal right to the possession, his agent or attorney, shall refuse or neglect to quit such possession, such person shall be guilty of an unlawful detainer. See page 278 of the digest of 1835.

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In every case in which the action for a forcible detainer is given by this section, the person to whom the action is given is supposed to have been in possession of the premises, and the defendant to have come into the possession under him either immediately or mediately. But it does not appear that Hatfield, the present plaintiff, ever has been in possession of the premises sued for. He purchased them at sheriff's sale. In the case of Michaud v. Walsh, administrator of Wilcox, it was decided that Wilcox, who claimed against Michaud by Michaud's own deed, was a trespasser against Michaud's possession, because he went to the house and took possession of the premises by raising a back window and entering during Michaud's absence: and Michaud recovered the possession in the action of forcible entry and detainer against Wilcox.

In every case in which the action for a forcible detainer is given by the statute, the person to whom the action is given is supposed to have been in possession of the premises, and the defendant to have come into the possession under him, either immediately or mediately. A purchaser at sheriff's sale, who has never been in possession, cannot maintain this action.

If then Michaud's deed did not give Wilcox the right to take possession, the sheriff's deed could not give the plaintiff, Hatfield, right to take possession in this case, and as Wilcox could have no right to take possession from Michaud, so here Hatfield can have no right to maintain this action to get possession against the defendant Wallace.

At the last term of the supreme court, held at St. Louis in the spring of this year, it was decided that the purchaser

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at a sheriff's sale could not on the right acquired by such purchase maintain an action for a forcible detainer. We are left then to enquire whether such a right to land as his is liable to be sold on execution.

The 17th section of the act to regulate executions provides that "all the real estate whereof the defendant, or any person for his use, was seized in law or equity on the day of the rendition of the judgment, order, or decree whereon execution issued, or at any time thereafter, "shall be liable to be seized and sold upon such judgment, &c. See p. 256 of the digest of 1835. In 59th section, of the same act, the legislature express their will that "the term real estate as used in this act, shall be construed to include all estate and interest in lands, tenements, and hereditaments "

An improvement on public lands is not subject to execution. It is not such an interest in land as is contemplated by the act regulating executions.

In the case of *Clark v. Shultz*, (see 4th vol. of Missouri Decisions, p. 235,) this kind of property is considered as no interest in the land, and a verbal sale may be made of it, notwithstanding the statute of frauds. It is true that where one intruder on the public lands is interrupted in his possession by another, the law gives him his action of forcible entry and detainer : See 28th section of the act concerning forcible entry and detainer, p. 281 of the digest : for the title is not looked into in that action, even if either party have a good one. See 25th section. p. 280. The legislature does not seem willing to take the possession of land from one man who is a trespasser on the United States, to give it to another who, by reserving such possession, would become equally with the other a trespasser. This will of the legislature seems to be signified in the provision that the defendant in the execution shall be seized in law or equity of the real estate which can be sold under execution. In my opinion, then, this right of possession of the public lands was not subject to be sold on execution, and even if it could have been rightfully sold, the purchaser could not have obtained the possession of it in this form of action. And this being the opinion of the majority of the court, the judgment of the circuit court is affirmed.

*Scott, Judge.*AUGUST TERM,
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I am of opinion that an improvement on public lands cannot be sold under execution.

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v.
Eddings.

RUCKER v. EDDINGS.

1. The circuit courts may, in the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence, allow the parties to a case to introduce testimony out of its order. But this discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses, to induce them to prop a cause whose weakness has been exposed.
2. After the plaintiff has closed his evidence the defendant has a right to the opinion of the court on the plaintiff's case, and the court cannot refuse the defendant's instruction on the allegation of the plaintiff, that he intends to give further evidence by examining the defendant's witnesses. The plaintiff, on the cross-examination of a witness, cannot give evidence in chief, or such evidence as should have been produced to establish his cause of action.
3. Where the rules of evidence, in the progress of a cause, have been relaxed in favor of one party, the other party has no right on that account, to disregard them. Every application for a relaxation of the rules must stand upon its own merits, without regard to what has previously been done. These principles, however, are only applicable on the supposition that the court rigidly enforces its rules, for where, by remissness in their enforcement, a disregard of them has been engendered, it would be unjust to permit one party to disregard the rules, and arbitrarily enforce them against the other party.

Todd & Clark for Appellant.

1st. The court erred in not instructing the jury to discharge the items of the account, not proven by him in the examination in chief.

2d. The court erred in permitting the plaintiff to prove the value of any work, without proving that the plaintiff had done the work.

3d. The court erred in permitting the plaintiff as rebutting evidence to prove in chief his cause of action.

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4th. The court erred after permitting the plaintiff in explanation, to prove the special agreement in the first count, in refusing the defendant leave to prove the nature of that agreement, and a failure on the plaintiff to fulfil it.

5th. The court erred in not permitting the defendant to give further testimony when all rules had been relaxed to the plaintiff's benefit. 2 Lit. Rep. 232; 1 Monroe, 117, 118; 6 Littel. 269; 1 J. J. Marshall, 70-607.

Davis for Appellee.

Opinion of the Court by Scott, Judge.

The appellee, Eddings, sued the appellant, Rucker, in assumpsit, and declared in his first count upon a special agreement for carpenters' work to be done about Rucker's house, at the sum of one hundred and fifteen dollars; and in a second count declared upon a *quantum meruit* for carpenters' work. The general issue was pleaded, and upon a trial the plaintiff below recovered \$144 70.

Only such facts will be stated from the record as will be necessary to a proper understanding of the points on which the reversal of the judgment below is sought. It appears that on the trial of the cause, the plaintiff below introduced a witness, and showed him an account for work and labor done by the plaintiff below for the appellant. The witness proved some items of the account amounting to between forty and fifty dollars, and after detailing a long altercation between one Lay, who, it seems, was a partner of the appellee in doing the work, and the defendant below, in which the one asserted that the work had been done, whilst the other denied it, he was asked his opinion as to the value of the residue of the work charged on the account, to which inquiry the defendant below objected, because no evidence had been given to show by whom the work had been done. The plaintiff here closed his evidence in chief, and thereupon the defendant moved the court to instruct the jury that they would disregard all the items of the plaintiff's account not proved. The plaintiff objected to this instruction, stating,

that he intended to prove these items by the defendant's testimony, and that he had other testimony. The court refused to give this instruction. AUGUST TERM,
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The defendant then introduced the before mentioned Lay as a witness, who testified that he was the partner of the plaintiff in doing the work in the account specified, and was entitled to one half of the amount to be recovered in this action. The plaintiff on a cross-examination of the witness was permitted by the court to prove his whole account, and the value of the work done; to this the defendant objected. After the examination of this witness, the defendant stated to the court that he had other witnesses to other points of his defence, but that on the evidence of the witness Lay he would rest his cause. And thereupon moved the court to instruct the jury that if they believe the witness, Lay, and the plaintiff were partners at the time of making the contract and doing the work charged in the plaintiff's account, they will find for the defendant. This instruction, with others of a like import, were objected to by the plaintiff, and whilst they were under discussion, the bill of exceptions states the plaintiff's counsel stated to the court that Lay, the witness, did not testify that he was a partner in making the contract for the work sued for, and applied to the court and had leave to recall the said witness, the defendant consenting. The witness on this last examination stated, that at the time the contract was made between plaintiff and defendant, he had not undertaken with the plaintiff to give him the job; that he and plaintiff had conversed about the job, had calculated the work, yet plaintiff went alone and made the contract, and the witness did not join him therein until the next time he saw him after the contract was made. Whereupon the defendant asked leave to withdraw his instructions, and introduce witnesses to other matter of defence, stating that the evidence was for the purpose of proving a special contract for the work; and that it had not been completed. To this the plaintiff objected and was sustained in his objection by the court. The refusal of the court to give the first instruction asked for; the permission given to the plaintiff to give evidence in chief on the cross-

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examination of the defendant's witness, and its refusal to permit the defendant to introduce evidence in the defence after the withdrawal of the last instructions, are errors complained of by the defendant.

The circuit courts may, in the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence, allow the parties to a case to introduce testimony out of its order. But this discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses, to induce them to prop a cause whose weakness has been exposed.

The law has intrusted courts with a discretion in allowing the parties to a cause to obviate the effects of inadvertance by the introduction of testimony out of its order. This discretion is to be exercised in furtherance of justice, and in a manner so as not to encourage the tampering with witnesses, to induce them to prop a cause whose weakness has been exposed. When mere formal proof has been omitted courts have allowed witnesses to be called or documents to be produced at any time before the jury retire, in order to supply it. 1 Starkie, 181. So it seems that material testimony ought not to be rejected because offered after the evidence is closed on both sides, unless it has been kept back by trick, and the opposite party would be deceived or injuriously affected by it. 4 Binney, 198. So after a witness has been examined and cross-examined, the court may, at its discretion, permit either party to examine him again, even as to new matter, at any time during the trial. 5 Binney, 489.

So where by an accidental omission plaintiff's attorney does not call and examine a witness who was present in court, and a non-suit is moved for after he has rested his case, the court will permit the witness to be examined in furtherance of justice. This court is sensible of the disadvantages under which it labors in revising the discretion of the circuit courts in matters of this kind, and a strong case must be presented for its interference before it can be induced to disturb the judgment of inferior courts by revising the exercise of the discretion with which they are entrusted in regard to the relaxation of the rules of evidence. It must be manifest to any one conversant with the trial of causes that the court before which a trial is had, from having an opportunity of seeing the conduct of parties, of witnessing the difference in the experience of the opposite counsel, and many incidents which cannot be set out in a bill of exceptions, and which influence the exercise of its discretion, (and properly too,) has superior means for a wise

and judicious exercise of this power than is possessed by this court, which is confined entirely to the facts spread upon the record.

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The defendant had unquestionably a right to the opinion of the court on the plaintiff's case after he had closed his evidence, and the court should not have refused the defendant's instruction on the allegations of the plaintiff that he intended giving further evidence by examining the defendant's witnesses. The purpose of a cross-examination is to explain the evidence in chief of the witness, or to elicit some fact which may impair or destroy its weight. The plaintiff, on the cross-examination of a witness, cannot give evidence in chief, or such evidence as should have been produced to establish his cause of action: and after the evidence has been closed on both sides, the general rule is to refuse either party permission to introduce additional testimony. These rules have been established to preserve order and regularity in the conduct of causes, and to prevent the unnecessary consumption of time, and should be sternly enforced by the court, subject to the discretion above mentioned. But after the rules have been relaxed in favor of one party, it seems that he would appear with an ill grace in demanding their enforcement against his adversary. It is not intended hereby to convey the idea that because the rules of evidence in the progress of a cause have been relaxed in favor of one party, that the other has a right to disregard them: and because the court properly permits one party to introduce evidence out of its order, that of itself is no reason why it should do so in favor of the other, who shows no cause for the relaxation of the rule. Every application of this kind must stand or fall on its own merits, without regard to what has been previously done. These principles are only applicable on the supposition that the court rigidly enforces its rules, for when by remissness in their enforcement, a disregard of them has been endangered, and they are permitted to slumber unobserved, it would be the height of injustice to spring them at once and without warning upon an unwary litigant. As a liberal indulgence was extended to one party well calculated to induce the other to believe that the

After the plaintiff has closed his evidence the defendant has a right to the opinion of the court on the plaintiff's case, and the court cannot refuse the defendant's instruction on the allegation of the plaintiff, that he intends to give further evidence by examining the defendant's witnesses. The plaintiff, on the cross examination of a witness, cannot give evidence in chief or such evidence as should have been produced to establish his cause of action.

Where the rules of evidence, in the progress of a cause, have been relaxed in favor of one party, the other party has no right, on that account, to disregard them. Every application for a relaxation of the rules must stand upon its

AUGUST TERM, 1841. rules would not be enforced against him, was there no other

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where, by remissness in their enforcement, a disregard of them has been engendered, it would be unjust to permit one party to disregard the rules, and arbitrarily enforce them against the other party.

reason, that would be sufficient error to reverse the judgment in this cause. But here, as the defendant was deprived of the evidence on which he rested his defence, by an explanation of the witness at the instance of the plaintiff, although with his consent, yet as it appears that the defendant had represented to the court before he closed his evidence, that he had other testimony, but was willing to go to the jury with what he had, and as the explanation of the witness entirely cut up his defence, it does seem that a proper exercise of the discretion of the court would have let him into his defence.

The judgment of the circuit court is reversed.

ABLE and ISBELL v. SHIELDS, and others

1. The assignment of a note or bond may be made on a piece of paper separate from that on which the note or bond is written.
2. Whenever the credit of a witness is to be impeached by proof of any thing he has said, or declared, or done in relation to the cause, he is first to be asked, upon cross-examination, whether he has said, or declared, or done that which is intended to be proved.
3. When a conditional assignment of a note is made, the law does not impose upon the maker the burden of ascertaining whether the condition has been performed, and the title of the assignee consequently extinguished.

Hayden for Plaintiffs.

1st. That the court below erred in overruling the motion of defendants to suppress the deposition of Duncan, as also in permitting the plaintiffs to read the same to the jury.

2d. The court erred in permitting the plaintiffs to read to the jury the deed of assignment.

3d. The court erred in refusing to permit defendants to

prove the facts by the witness, Arbuckle, which they proposed to prove by him. AUGUST TERM,
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4th. The court erred in refusing to permit the defendants to prove that the deponent, Frederick Duncan, made contradictory statements in relation to facts about which he deposed as a witness at a different time. Able and Isbell, v. Shields, and others.

5th. The court erred in overruling the motion for a new trial.

Winston for Defendants.

1st. The court committed no error in overruling the motion to suppress the deposition, because the deposition was properly taken. See Rev. Code, 220.

2d. The court did right in permitting the deed of assignment to be given in evidence: the law does not require the assignment of promissory notes, not negotiable, to be written on the notes themselves. Rev. Stat. 104; 2 Bibb's Reports, 83; 3 Monroe, 46.

3d. There was no error in rejecting Arbuckle's testimony, because he was interested in the event of the suit.—Peak's Evidence, 180.

4th. The court committed no error in permitting the promissory notes of Shannon and Arbuckle to the plaintiffs, to be read in evidence, as rebutting evidence.

5th. The court committed no error in suffering the deposition to be read on the trial. See 4 Mo. R. 118.

6th. There was no error in refusing to permit evidence of Duncan's making statements contradictory of what he had made in his deposition, because he was not examined as to those statements at the time his deposition was taken. See 1 Starkie, 145, 182.

7th. The court did right in not arresting the judgment, because the declaration was substantially good.

Opinion of the Court by Napton, Judge.

The appellees, Shields and others, brought an action of debt against Isbell and Able, as assignees of a note given by

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defendants to Shannon and Arbuckle, for the payment of \$316 62½. The defendants pleaded non assignment, a re-delivery of the note sued on, *nil debet*, and set-off. Upon which several pleas issues were taken and a trial had. At the trial term, the defendants moved to suppress the deposition of one Duncan, upon the ground of want of notice to plaintiffs, and the want of proof that the witness came within any of the provisions of the law authorising such depositions to be read on certain contingencies. There was proof of service upon defendant's wife in due time, but no evidence to show at what distance the defendants lived from the place of trial. The motion to suppress was overruled.

The plaintiffs on the trial, after reading the note in evidence, read a deed of assignment from Shannon & Arbuckle, which is substantially as follows: The deed declared that the makers, in consideration of the sum of two thousand dollars paid by plaintiffs, transferred, assigned, and delivered to the plaintiffs certain notes, (reciting therein, among others, the note sued on,) and authorised and empowered the said plaintiffs to use their, the assignee's names, in suing for and collecting the same, but upon condition, that if said Arbuckle and Shannon should in a reasonable time give good and sufficient security for the payment of the several demands owing to the plaintiffs, (assignees) then the said Shannon and Arbuckle were to be released from all demands by said plaintiffs, and the notes, &c., to be delivered up to said assignees. This deed was signed and sealed by the assignees.

The defendants then introduced several witnesses, whose testimony conduced to show that the condition of the deed of assignment had been complied with, and the notes given up. Among others, defendants offered Arbuckle, one of the assignors, to prove that the condition had been complied with, but objections being urged to his competency, he was excluded by the court.

To rebut the testimony on this head, the plaintiffs offered to read the deposition of Duncan, but the defendants objected, because no reason had been given why the witness was not personally present. The court, however, overruled the

objection and allowed the deposition to be read. The plain- AUGUST TERM, 1841.
 tiffs also read two promissory notes executed by Shannon & Arbuckle to Shields & Hickerson, for the payment of more Able and Is-
 than \$1000, bearing date previous to said assignment, and bells v.
 still in the hands of Shields & Hickerson unpaid, which tes- Shields and
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 fendants then introduced a witness, by whom he proposed
 to show that Duncan, the deponent, whose testimony had
 been read to the jury, had shortly after the occurrence about
 which he testified, given a very different and contradictory
 account from that given in his deposition. The court refus-
 ed to let the witness testify, because Duncan had not been
 interrogated when making his deposition, whether he had
 made any such contradictory statements.

To all the opinions of the court, exceptions were duly taken. A verdict was given for plaintiffs, and a motion for a new trial was made and overruled.

The most material question to be decided in this case arises on the proper construction of this assignment. Our act makes the assignee the legal owner of the bond or notes. That assignments may be made on a piece of paper separate from that on which the note or bond is written appears to be settled in Kentucky, where statutes on this subject are similar to our own. *Justone v. Williamson*, 2 Bibb, 83. The decision of the Kentucky court, on statutes from which our own are copied, may be safely followed, unless great inconvenience appears likely to arise. I see no reason why several bonds and notes may not be assigned by one instrument, and the same legal operation must be given to the instrument, as though a single bond only were assigned. The fact, that this was a conditional assignment, does not vary the legal ownership; until the condition is performed, the assignee is clearly the legal owner.

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The deposition of Duncan was improperly admitted. No reason was shown to the circuit court, to bring him within any of the contingencies of the statute, which would authorise his deposition to be read. The substance of that deposition was, that he was a collector for plaintiffs, called on defendants for the money due on this note, received a portion, and was promised the balance.

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The object of this deposition was to rebut the testimony adduced by defendants in support of their second plea, that the notes were delivered up. The testimony was material to this issue, and the circuit court committed error in my opinion on this point.

Neither do I think the issue itself immaterial. The cancellation of the instrument of assignment and the redelivery of the notes would be the best evidence that the conditions had been complied with, and the legal ownership transferred to the assignees. But a compliance with the conditions of the instrument on the part of the assignors, and a delivery of the notes and bonds assigned to them, would ipso facto effect a nullification of this instrument, without any formal reassignment. Such formal conveyances are not, I believe, now deemed necessary even in cases of extinguished mortgages, much less would I hold it necessary in a case like the present.

Whenever the credit of a witness is subject to be impeached by proof of any thing he has said, or declared, or done, in relation to the cause, he is first to be asked, upon cross examination, whether he has said, or declared, or done, that which is intended to be proved.

The witness, Arbuckle, was clearly incompetent, the object of his testimony being to show title out of the plaintiffs and in himself. Bayard's Peake, 180. Nor had the defendants any right to contradict the deposition of Duncan, by proving contradictory statements, without first having called his attention to such statements. 3 Stark. Ev. 183.

The introduction of the two notes in evidence which showed an indebtedness on the part of the assignors to two of the plaintiffs, appears to me irrelevant; and because the conditions upon which the deed was to be void were not a liquidation of their debts, but giving good and ample security.

Because the court admitted improper testimony on a material point in issue, I am of opinion the judgment should be reversed.

Scott, Judge.

Whether the deposition of the witness was properly or improperly admitted, is a question I deem unnecessary to determine, as it contained evidence relative to an issue immaterial and extrinsic to the merits of the cause. When a conditional assignment of a note is made, the law does not

When a conditional as-

impose on the maker the burden of ascertaining whether the condition has been performed, and the title of the assignee consequently extinguished.

If the maker pays the assignee, although the title of the assignee may have been defeated by the performance of the condition, yet he is indemnified, and the assignor cannot complain, as he had no right to require the maker at his peril to learn whether the assignee's title to the instrument has been extinguished. If then he is not bound to make this inquiry, and he is indemnified in the payment, he cannot set up at law the defence that the assignees' title had failed. Moreover to enable the assignee of a promissory note to maintain an action in his own name the assignment must be shown to have been in writing; by the assignment the payee passed the legal title to the assignee, and although the extinguishment of that title by the performance of the condition on which it was made, may equitably entitle the assignor to the note, yet unless there is an actual reassignment, there is no evidence that he is the legal owner of the note. In all other parts of judge Napton's opinion except that in relation to the relevancy of the evidence concerning the two notes, I concur.

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Tompkins, Judge.

I concur in judge Scott's opinion, and the judgment is consequently affirmed.

WRIGHT V. CROCKETT.

1. If a conveyance of property is not prohibited by some law, as violative of the rules ordained by the legislature for its disposal, or because it affects the rights of creditors or purchasers, its validity cannot be questioned.
2. Where a judgment creditor seeks to avoid a conveyance on the ground of fraud, he must produce his judgment.

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1841.*Todd & Kirtly for Appellant.*Wright
v.
Crocket.

1st. We rely that the deed of trust was a valid executed deed, and inhibited by none of the principles settled in the numerous decisions made on deeds of assignment by this court. The creditors are not required to become parties to the deed; there is no prohibited benefit secured to the maker of the deed; it is an assignment of all his property and for all his creditors, and is without the objections held fatal to deeds of assignment in the following cases: *Swearengen v. Slicer*, 5 Mo. R. 242; *Hughs v. Ellison*, 5 Mo. R. 463; *Crow & Tevis v. Ruby*, 5 Mo. R. 488; *Thomas v. Reynolds*, 6 Mo. R. 462; *Brown v. Knox & Boggs*, 6 Mo. R., and *Drake v. Rogers*, 5 Mo. R. from 302 to 320.

2d. The deed requires no act to be done by the creditors, is for their benefit, and their assent is to be presumed. 1 Black. 457; 11 Whea. 78; *Hood v. Sibley*, 3 Mo. R. 290, and 5 do. 484.

3rd. If the assent of the creditors be required in any form they are competent to prove that assent, and the court erred in rejecting their testimony.

4th. The deed is valid to transfer the possession of the property to the plaintiff, and the defendant has shown no right to interfere with that possession, he has not proved himself a judgment creditor, is a trespasser, and his motion for the nonsuit was at the least premature.

Hayden for Appellee.

1st. That the court below committed no error in rejecting any of the evidence offered by plaintiff.

2d. The court did not err in giving the instruction to the jury as prayed for by defendant.

3d. The court was right in overruling the motion of plaintiff, to set aside the nonsuit.

Opinion of the Court by Scott, Judge.

This was an action of trover, brought by Geo. M. Wright

against Wm. Crocket, for taking and converting property conveyed in trust to the plaintiff by James Wright, for the benefit of his creditors. On the trial of the cause, the plaintiff introduced a witness, who proved that as constable, and by the direction of the defendant, he levied an attachment in his, defendants, name, against James M. Wright, the grantor in the deed of assignment, on the property conveyed to the plaintiff; and that when the defendant directed the witness to make the levy, he spoke of the deed of trust having been made, and complained that his debt was not secured by the same; the property mentioned in the deed was delivered to the plaintiff, except a horse in another county, and some hogs running at large. The deed of assignment was given in evidence, and after some other testimony, not material to be detailed, the defendant moved the court to instruct the jury that the plaintiff could not sustain this action, without proving the assent of the creditors to the deed of trust, or some of them. Which instruction the court gave, and thereupon the plaintiff submitted to a nonsuit, and afterwards moved to set it aside, which motion was overruled, and the cause is brought here by appeal. The instruction of the court to the jury is the error complained of.

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In whatever light a general assignment of property for the benefit of creditors, with or without their assent, may be received, whether as valid or invalid, its invalidity, if such is its character, is traced to the statute prohibiting fraudulent conveyances, which was enacted for the protection of creditors and purchasers. No one can complain of the invalidity of such assignments, unless it shows that he holds the one or the other of these relations to the person by whom they are made.

If a conveyance of property is not prohibited by some law, as violative of the rules ordained by the legislature for its disposal, or because it affects the rights of creditors or purchasers, its validity cannot be questioned. It is binding between the parties. In this case there is no evidence showing that the defendant was a creditor of the grantor of the deed of assignment. the mention of the fact by the

If a conveyance of property is not prohibited by some law, as violative of the rules ordained by the legislature for its disposal, or be-

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witness, that he acted under an attachment, and sold the property by virtue of an execution, is evidence that there was an attachment and execution, but what were their contents does not appear, nor could they have been proved by parol, without laying a proper foundation for such testimony; nor is it to be presumed for the defendant that the writs of attachment and execution were founded upon a debt and judgment, although the process alone would be a sufficient justification to the officer, yet as to the dependant, it was necessary that he should have produced his judgment, and until its production, he did not show himself in a situation to defeat the assignment made to the plaintiff. The act against fraudulent conveyances does not avoid them against all the world, but only against creditors and purchasers. Let the judgment below be reversed.

NEALE V. MCKINSTRY.

1. A subscribing witness cannot prove the execution of an instrument of writing, (being the foundation of the action,) which is denied by plea, verified by affidavit, without having the instrument before him, at the time of deposing. The witness cannot, without inspection, swear to the genuineness of his own hand writing, or that of the obligor.
2. If the instructions given by the court are consistent with each other, and, taken together, constitute a correct exposition of the law applicable to the case, this court will not reverse the judgment, because a single instruction, taken by itself, is defective. Whilst erroneous instructions cannot be cured by subsequent instructions that are correct, a defective instruction, or an instruction that is not true under all contingencies, and is therefore not applicable to all the facts before the jury, may be supplied by the instructions that follow.
3. If there be no testimony whatever on a particular point, it is unnecessary for the court to inform the jury of that fact.

Hayden for Appellant.

1st. That the court erred in permitting the note sued on to be read to the jury upon the proof adduced by plaintiff of its execution.

2d. That the court erred in giving to the jury the instructions prayed for by plaintiff. AUGUST TERM,
1841.

3d. The court erred in not giving to the jury the instructions asked for by defendant.

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McKinstry.

4th. The court erred in overruling the motion for a new trial.

Leonard for Appellee.

1st. As to third persons, a partnership continues until proper notice of its dissolution is given. Cary on Partnership, 181, 2-3; Godfrey v. Turnbull, 1 Esp. 371; Parkin v. Crowther, 3 Esp. 248; Gow on Partnership, 306 & 307; Ketchum v. Clark, 6 John. Rep. 144; 3 Little Rep. 423; 2 Stark. Ev. 589.

2d. While a general notice of the dissolution is sufficient for the world at large. Wright & others v. Pulham, 2 Chitty Rep. 121; Lansons v. Ten Eyck, 2 John. Rep. 300; 6 John. R. 147, 148; Martin v. Walton & co., 1 McCord's R. 16; Graham v. Thompson, Peake, 42; Graham v. Hope, Peake 154.

Actual notice must be given to those who have dealt with the firm. Cary on Partnership, 181-2-3, and cases cited above.

3d. In the case at bar, there had been mutual dealings and credits between the plaintiff and defendants, and no notice, either general or actual, had been given of the dissolution of the partnership.

4th. The proof of the execution of the note sued on, was sufficient to entitle the note to go in evidence to the jury. 1 Phil. Ev. 413, note (a.)

Opinion of the Court by Napton, Judge.

This was a petition in debt brought by Robert McKinstry, surviving partner of the firm of Robert McKinstry & co., against Daniel B. Neale, of the firm of Osburn & Neale. The note upon which suit was brought, is dated 21st Sep. 1836, and payable one day after date, for value received,

AUGUST TERM, 1841. and signed "Osburn & Neale." Defendant plead *nil debet* and *non est factum*, verified by affidavit.

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On the trial it appeared that Milton Osburn and Daniel B. Neale, were in partnership in the business of tavern keeping, in the town of Benton, in the State of Mississippi, during the year 1835, under the style of "Osburn & Neale." Robert McKinstry & John McKinstry were merchants in the same town, doing business under the style of "Robert McKinstry & co." John McKinstry died in 1836, and the note sued on was given by Osburn to close mutual accounts between the firm of Osburn & Neale and Robert McKinstry & co. The note was given in 1836, about eight months after Osburn & Neale had ceased to do business as tavern keepers in Benton.

There was evidence given by the plaintiff to show that no notice of the dissolution of the firm of Osburn & Neale had been given McKinstry & co., and that there had been mutual dealings between the firms during the existence of the partnership. The plaintiff offered to prove the execution of the note by the deposition of the subscribing witness, who testified, that the original note of which a copy was given in his deposition, was executed in his presence by Milton Osburn, one of the supposed firm of "Osburn & Neale," and by him signed and delivered. This evidence was objected to by defendant, but was allowed to go to the jury.

The defendant proved that the business of tavern keeping was discontinued by Osburn & Neale, at the expiration of the year 1835, and that even during the existence of the partnership, Osburn had alone conducted the business. Neale being a citizen and resident of Missouri. It was also proved, that McKinstry was a guest of the tavern, both whilst it was conducted by Osburn & Neale, and after it came into the hands of their successors.

At the instance of the plaintiff, the court instructed the jury, that if they believe the note sued on was given by Milton Osburn, and that a partnership had previously existed between Osburn & Neale, it will be presumed to have been given for a partnership debt, unless the contrary be

shown: that if Osburn & Neale were in the habit of dealing with the plaintiffs, and never gave any special notice of the dissolution of the partnership to the plaintiffs, they are liable on this note: that to render the dissolution of the partnership effectual, notice must be given of it to the world, and if no such notice was given, the firm may be bound by a contract made by one partner in the usual course of business, and in the name of the firm, with a person who had no notice of the dissolution, and that the mere discontinuance of the business of tavern keeping in Benton was not of itself sufficient notice of the dissolution of the partnership. Several other instructions were given, which seem to be to the same purport, and therefore not material to be noticed. The court also instructed the jury, that there was no evidence of any notice of the dissolution of the partnership ever given to plaintiff.

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At the request of the defendant, the court further instructed the jury, that the cessation of the partners in the business of tavern keeping, is evidence that the partnership in that business had ceased at that place, and if the jury believed from the evidence that the plaintiff knew of the cessation of the business at the time of the giving of the note, they ought to find for defendant. Several other instructions were asked by the defendant, which I deem it unnecessary to notice.

A verdict was found for the plaintiff, and a motion for a new trial was made and overruled.

It is assigned for error, that the circuit court admitted incompetent proof of the existence of the note, and gave improper instructions. Whether a subscribing witness can prove an instrument without having that instrument before him is, so far as I am apprised, a new question. That circumstance of itself would incline this court against such a rule of evidence, unless sound reason and general principles would require its adoption. The elementary works on evidence no where give countenance to the admission of such proof, and no authority has been shown to authorise it.

It is difficult to conceive how a witness proves the execution of an instrument which is denied by plea and affidavit, A subscribing witness cannot prove the execution of an instrument of writing, (being the foundation of the action,) which is denied by plea, verified by affidavit, without having the instrument before him, at the time of deposing. The witness can-

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not, without inspection, swear to the genuineness of his own hand writing, or that of the obligor.

The identical instrument attempted to be proved, is not before the witness, and without inspection he cannot swear to the genuineness of his own handwriting, or that of the obligor. 1 Stark. Ev. 318.

It is not perceived, that any inconvenience or hardship is likely to result from the enforcement of the rules heretofore prevailing in relation to the attestation of deeds. If the subscribing witness resides beyond the jurisdiction of the court, his hand writing may be proved, and all which is required by the law is, that the best evidence of which the matter is susceptible, shall be produced, and where that is impracticable, secondary evidence is let in.

Though the note upon which suit is instituted is required to be filed with the clerk, the courts will, upon suitable suggestions, give the party leave to withdraw the original by leaving a copy with the clerk. Numerous instructions were asked of the court, in this case, by both parties, some of which were refused and some given. If the instructions given are consistent with each other, and taken together constitute a correct exposition of the law applicable to the case, a reversal of the judgment cannot be asked, because a single instruction, taken by itself, is defective. Whilst erroneous instructions cannot be cured by subsequent instructions that are correct, a defective instruction, or an instruction that is not true under all contingencies, and is therefore not applicable to all the facts before the jury, may be supplied by the instructions which follow.

If the instructions given by the court are consistent with each other, & taken together, constitute a correct exposition of the law applicable to the case, this court will not reverse the judgment, because a single instruction, taken by itself, is defective. Whilst erroneous instructions cannot be cured by subsequent instructions that are correct, a de-

Examining the instructions of the court in this case upon these principles, the law of the case appears in the main to have been correctly expounded to the jury. If the note sued on was executed by Osburn after the dissolution of the partnership between him and Neale, to close a partnership transaction, the defendant was liable, unless special notice was given to McKinstry of the dissolution of the partnership, or unless McKinstry had *actual* knowledge of such dissolution. The fact, that the business of tavern keeping had ceased in the town where both the plaintiff and defend-

ant's partner resided, was a circumstance proper to go to the jury, as evidence that McKinsty had actual notice of the dissolution of the partnership, and taken in connection with such other facts as might be proved on the trial, was a subject for their deliberation, to which such weight and importance might be attached as in their opinion it deserved. As the judgment in this case is to be reversed for the error first assigned, it is not deemed necessary to notice every instruction which was given or refused by the circuit court; only those of the instructions given are believed entitled to particular animadversion.

The court instructed the jury, that the discontinuance of the business of tavern keeping was not of itself sufficient evidence of a dissolution of partnership, so far, I suppose, as third parties were concerned, and that there was no evidence of any notice of the dissolution of the partnership ever given to plaintiff.

Whilst this court would be unwilling to reverse a judgment because of such instructions as these, where, in point of fact, they were true, and consequently could have been no wise prejudicial to the parties, we are of opinion that a court is not bound to give such instructions. If testimony is offered which is incompetent, let it be excluded; if competent, and it goes to the jury, the triors of the fact may give such weight to the evidence as they think proper. If there be no testimony at all on a particular point, it is surely unnecessary that the court should inform the jury of that fact. They may be presumed to be as well apprised of that as the court. Nor is it the province of the court to determine upon the weight of evidence, except, perhaps, on motions for new trial. If competent testimony has been submitted to the jury, the sufficiency or insufficiency of that evidence is to be determined by the jury.

Judgment reversed and cause remanded.

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fective instruction, or an instruction that is not true under all contingencies, & is therefore not applicable to all the facts before the jury, may be supplied by the instructions that follow.

If there be no testimony whatever on a particular point, it is unnecessary for the court to inform the jury of that fact.

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SHIELDS & HICKERSON V. BOGLIOLO.

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1. The 20th sec. of the act concerning "costs," (R. C. 1835, p. 130,) gives to courts of equity a discretion in awarding costs, except in cases where the bill is dismissed, and this court would not interfere with the exercise of this discretion, except, perhaps, in very palpable cases.
2. In the rescision of contracts for the conveyance of land, where the vendee has been in possession, and the vendor has received the purchase money, the general rule is to consider the use of the money and the use of the land as equivalent. This rule, however, would not apply where the land was wild, and wholly unproductive.

Hayden for Appellants.

1st. That upon the proofs in the cause the chancellor, upon the rescision of the contract, ought to have given complainants interest upon the money paid, down to the time of pronouncing of the decree, from the time it was paid.

2d. That the decree should have given the costs of the proceedings at law and in chancery to complainants, and that the court erred in overruling the motion for a new hearing as prayed for. See 1 Dana's Rep. 421, Taylor v. Porter; same book, 478, Johnson v. Tool; same book, 594, Wickliffe v. Clay

Miller for Appellee.

The only question presented for the consideration of this court, is whether the complainants, appellants here, should have recovered interest upon the four hundred dollars paid by them at the time of sale, and whether the court should have decreed the costs of the suit at law, and of this suit against complainants. The counsel for appellee will insist that the circuit court very properly overruled motion for new trial, and that there is no error in the decree.

Opinion of the Court by Napton, Judge.

The appellants filed their bill in chancery, praying an injunction against two judgments at law, obtained against them in favor of the appellee. The complainants allege in

their bill, that the consideration of the notes upon which judgment had been obtained, was a tract of land containing two hundred arpens, lying in the county of Cooper, and sold to them by defendant for the sum of \$1700, in the year 1836. That complainants paid \$400 in cash, and executed two notes for \$1000, payable in one and two years, and one note for \$300, to be paid when satisfactory evidence was presented to complainants or their counsel, that he, Bogliolo, had a good legal title. The defendant, on his part, covenanted that he had full power to convey, and would make a good title upon payment of the last instalment. The bill further sets forth, that Bogliolo had instituted suits upon the two notes of complainants and recovered judgment, and caused an execution to be issued; and charges that said defendant, at the time he sold said land to complainants, "well knew that he was not the owner thereof, and had no title thereto; that he had no legal right to sell the same, and that he was not seized of an indefeasible estate in fee simple, or any other estate whatever to the premises, and consequently, the representations of said Bogliolo were false and fraudulent." The bill further charges that Bogliolo had not, at the time of filing the bill, any legal title, nor had ever shown any evidences of title to complainants, though often requested to do so. The bill further charges, that Bogliolo is involved in debt, and in doubtful circumstances, in consequence of which they fear a loss of both the land and the money. The bill prays the chancellor to restrain the payment of the purchase money, but prays a specific performance, if defendant can show a good title: but if upon inspection of the title, it is found to be defective, prays a rescission of the contract.

The defendant, in his answer, admits the contract of sale as set forth in the bill, denies all allegations of fraud, avers that he has a good and indefeasible estate in fee simple, and had one, at the time the contract was made. Defendant also denies that he is in failing or doubtful circumstances, on the contrary, that to secure Shields and Hickerson in the four hundred dollars paid, he had deposited with one William Gibson, a bond on two responsible men for \$840.

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Defendant further avers, that appellants had been in undisturbed possession of the land ever since the making of the contract, and had cut and used considerable timber on the same. Exceptions to the answer were filed by the complainants, and a general replication, and the cause set for hearing at the next term; at which term, by consent of parties, the contract was rescinded and annulled, and the court decreed a rescision, enjoined the judgments at law, ordered all bonds and agreements between the parties to be cancelled, and that complainants should deliver to defendant possession of the land. The court further decreed that defendant should refund the four hundred dollars paid without interest, and complainants should pay the costs of the suits at law and in equity. From the decree complainants appealed.

From the bill of exceptions, it appears, that complainants introduced witnesses to prove the land worth fifteen or twenty dollars per acre, if the title were good.

A witness for defendant proved, that the plaintiffs had given him permission to haul dead timber from the land, and that plaintiffs had hired a wagon and team from him, which they employed about a month in hauling saw logs from land lying in the direction of the land in controversy; and the witness knew of no other lands claimed by plaintiffs lying in that neighborhood.

The objections taken to the decree of the chancellor are, that the complainants were ordered to pay costs in the suits at law and equity, and were not allowed interest upon that portion of the purchase money which had been paid.

To ascertain the propriety of the decree for costs, it will be necessary to look at the facts presented by the record, at the rendition of the decree. The bill is framed with a double prayer: after charging that defendant had no title, it asks a specific performance, provided it should appear to the court, upon inspection of the title papers, that their surmises, in that particular, should turn out to be false; but if, on the other hand, the defendant should produce no title, or one which might be esteemed defective, they ask a rescision of the contract, and a return of the purchase money.

It may be observed here, that this bill was very objectionable. If the defendant had no title, it was useless to ask a specific performance, and such bills are properly dismissed with costs. A general charge of want of title is, besides, a very vague and indefinite one, upon which to ground an interference of the chancellor in restraining the collection of purchase money. (*French v. Howard*, 3 Bibb, 301.) But in addition to this, after charging that the defendant had no title whatsoever, it calls on the defendant to expose his title to the court, and if upon investigation it was not satisfactory, the bill demands a rescission of the contract. Such bills as these, framed in the alternative, and grounded on vague and indefinite surmises, if tolerated by the courts, would be calculated to give great advantages to purchasers.

The answer denies every allegation in the bill, at least every one tending to impute any fraud or remissness of duty to the defendant. To this answer is filed a general replication, and no proofs whatever are offered. Upon this state of facts, it appears to me, without a compromise, the chancellor must have dismissed the bill.

Before the passage of our act regulating costs in chancery proceedings, the subject of costs was a matter which addressed itself to the sound discretion of the chancellor. (Coleman v. Moore, 3 Littel, 357.) The 20th section of our act concerning costs, appears to be still more explicit than the rule which prevailed previously to its passage. That section provides, that where the bill is dismissed, at the instance of either party, the complainant shall pay his costs; "and in all other cases in equity, it shall lie in the discretion of the court to award costs or not."

It might be very well doubted whether, under this provision of our statute, an appellate court would have any right to interfere with the exercise of this discretion. It is at least apparent, that a very palpable case must be made out to authorise such interference, and no such case is presented by this record.

In relation to the interest upon the purchase money, which the plaintiffs claim, the general rule appears to be well settled. The presumption in equity will be, that when the

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purchaser has been put in possession, the use of the money and the use of the land are equivalent. *Williams v. Rogers*, 2 Dana R. 375; *Taylor v. Porter*, 1 Dana, 423; *Coleman v. Moore*, 3 Littel, 357. This rule may not in all cases be equitable; and I am not prepared to say, that a purchase of wild land, from which no benefit could arise, would be held such a presumption. In the present case, however, though the land was shown to be wild land, there was evidence that acts of ownership had been exercised over it by plaintiffs, and that by their permission wood had been carried off from it. There was also testimony from which the court might well have inferred, that the plaintiffs themselves had hauled saw logs from the land. The presumption then, which perhaps might arise in a case of land in a state of nature, that they were unproductive, is amply rebutted here, where the land was within two miles of the town of Boonville, where the plaintiffs resided, and was proved to be heavily timbered, and worth fifteen or twenty dollars an acre. There was, therefore, no error in the decree on this point.

Judgment affirmed.

DAMERON V. WILLIAMS, trustee of ARNOLD.

1. *Trespass vi et armis* will not lie against the plaintiff in an execution for the act of the officer, who levied on plaintiff's property by the direction of the defendant, the latter not being present at the levy, nor in any other manner aiding the officer.
2. A. conveyed certain property to B. in trust to secure to C. a debt due him from A. In an action by B. against D. for taking the property, A. was held incompetent to prove that the property taken was the same that he had conveyed to B., as A. had a residuary interest in the property.
3. If the plaintiff, in an execution issued on a judgment rendered by a justice of the peace, wishes to show himself a judgment creditor, for the purpose of contesting the validity of a deed, he must produce the whole transcript of the justices' docket, that it may appear not only that there was an execution, but a judgment to warrant the execution, and other previous proceedings to warrant the judgment.

*Todd for Plaintiff.*AUGUST TERM,
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1st. The court erred in admitting Duncan, the grantor in the deed, to testify; he was interested in increasing the remaining funds after paying Arnold's debt, which were to revert to himself.

2d. The deed of trust was void in law, and gave no title to Williams, the plaintiff: first, because it was covenanted, and the property did remain in the grantor's possession after executing the deed.

3d. The deed was fraudulent and void, in fact, because the grantor used the property as his own, and traded upon and sold the estate with the grantees knowledge.

4th. The verdict should have been for the defendant, as no act of trespass was proven to have been committed by defendant. Trespass will not lie for the assent in receiving money made by a levy illegally made by an officer. Second, No actual possession was in plaintiff, which is necessary to sustain the action, or a general right of property.

5th. The plaintiff cannot now object to the defendant not having proven himself a judgment creditor, to resist the deed as fraudulent; for, 1st, the plaintiff's declaration alleges the fact; 2d, the plaintiff proved the fact; 3d, the plaintiff made no exception in the court below to the defendant's right to prove the deed fraudulent.

Opinion of the Court by Tompkins, Judge.

Williams brought his action of trespass against Dameron, and had a judgment against him, to reverse which Dameron prosecutes this writ of error.

The declaration is in these terms, viz: "For that the said Joseph Dameron on, &c., at &c., with force and arms, (he the said Joseph Dameron being the plaintiff in two executions then and there in the hands of the acting constable of Marion township, in said county of Monroe, which said executions were against one David Duncan, and then and there directed James Porter, the said Porter then and there being the acting constable of Marion township aforesaid, to

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the hands of said Porter, at that time as constable as aforesaid, in favor of said Dameron, and against one David Duncan; and the plaintiff avers that the said constable, in pursuance of the direction of the said defendant Dameron, did levy on and seize the said property of the said plaintiff, and kept and detained the said property from the said plaintiff for a long space of time, &c., and then and there carried away the same to the use of the said defendant, &c."

To this declaration Dameron pleads not guilty, and issue was joined.

The evidence is, that David Duncan, the person mentioned in the declaration, had by deed conveyed to Williams, the plaintiff in this suit, the property charged in the declaration to have been taken and sold by the constable. This property was conveyed to Williams in trust for one William Arnold, to secure to Arnold the payment of a sum of money due by bond from Duncan to Arnold; and of which property the residue was to be returned to Duncan, after the debt, &c. was paid to Arnold. Duncan was admitted as a witness to prove that the property taken and sold by the constable was the same which he by his deed had conveyed to Williams, the plaintiff, for the purpose of raising money for the use of Arnold as aforesaid, the sale by the constable, &c.

Trespass vi et armis will not lie against the plaintiff in an execution for the act of the officer, who levied on plaintiff's property by the direction of the defendant, the latter not being present at the levy, nor in any other manner aiding the officer. There was no evidence that Dameron, the defendant, was present aiding and assisting the constable in taking this property into his possession, under the authority of the executions in which he was plaintiff. No evidence was offered to connect Dameron with the constable in the taking and carrying away the property. It was not in evidence that he was even present looking on.

The defendants made their objections to the admission of Duncan as a witness, and excepted to the opinion of the court in that behalf.

The defendants moved in arrest of judgment, and for a new trial, assigning for reason, among other things, that the finding of the court, acting as a jury, was against law and evidence.

It is assigned for error that the court committed error in refusing a new trial. 2d, In admitting the evidence of Duncan.

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The declaration is in form a declaration in trespass *vi et armis*; all the matter set out in it is such as would entitle a plaintiff to an action for consequential damages only.

If Williams, in his fiduciary character, sustained any injury by the taking and selling of this property, it was in consequence of the *direction* or advice of Dameron to the constable, and not in consequence of any act of Dameron himself: and had the constable, acting under the authority of Dameron's execution, sold the same property, without having had any communication with Dameron, plaintiff in the execution, he, Williams, might, notwithstanding, have maintained his action on the case against Dameron; for the constable sold the property for the benefit of Dameron, and at his implied request.

The constable, but for the trial of the right of property testified to in the evidence preserved, would have himself been liable to be sued in trespass. It may be asked, if the facts from which the injury results are set out, what does it signify, whether the form of the action be trespass *vi et armis*, or trespass on the case. If an action of trespass on the case had been brought, the defendant might have given in evidence, under the general issue, any thing that would justify him in taking and selling the property; while in an action for a trespass *vi et armis* he is, under that issue, restricted to a denial of having taken the property. In an action of trespass *vi et armis*, it should have been charged that Dameron took the property himself; and such an allegation would have been supported by proof that he, in company with the constable, took it, &c.

The court committed error, also, in admitting Duncan to testify. The interest of Duncan was not, as is contended, equally balanced. True it is, the property taken from this fund goes to satisfy another debt. But he had a residuary interest in the fund conveyed to the plaintiff, Williams, for the use of Arnold. This fund he would keep in his possession longer than other property not therein included. Be-

A. conveyed certain property to B. in trust to secure to C a debt due him from A. In an action by B. against D. for taking this property, A.

AUGUST TERM, 1841. cause then the action was ill conceived ; nothing set out in the declaration going to show a trespass, and no evidence

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was held incompetent to prove that the property taken was the same that he had conveyed to B., as A. it appears that they were judgment creditors, and therefore they had a right, even under this issue, to contest the validity of the deed of Duncan to Williams.

If the plaintiff, in an execution issued on a judgment rendered by a justice of the peace, wishes to show himself a judgment creditor, for the judgment. An execution I understand to be an authority to the officer, who by it is commanded to execute and sell property. But if the plaintiff in the execution wishes to show himself a judgment creditor, he must produce the whole transcript of the justices' docket, that it may appear not only that there was an execution, but a judgment to warrant the execution, and other previous proceedings to warrant the judgment.

purpose of contesting the validity of a deed, he must produce the whole transcript of the justices' docket, that it may appear not only that there was an execution, but a judgment to warrant the execution, and other previous proceedings to warrant the judgment.

CATO (a man of color,) v. HUTSON.

1. The plaintiff's name in the declaration was written "Hudson," and in the writ "Hutson." Variance held immaterial.
2. In an action to recover money won at gaming, under the provisions of the act to restrain gaming, the defendant will not be permitted to give in evidence, under the general issue, matter of defence arising subsequent to the filing of the plea.
3. If the bet was made in the name of the plaintiff, the fact that others were interested with him in the bet, does not make it necessary that they should join in the suit.
4. Where a bet was made with defendant's agent, who did not disclose the fact that he was acting as agent at the time of making the bet, the action to recover the money lost was properly brought against the defendant.

Error from the Circuit Court of Cole county.

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Hayden for Plaintiff.

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1st. The court erred in not sustaining the defendant's motion to quash the original writ.

2d. The court erred in not permitting the defendant to prove that the matter of difference involved in the suit had been decided and settled by the arbitrators selected by the parties, as proposed to be proved by defendant.

3d. The court erred in refusing to give the several instructions to the jury as asked for by defendant.

4th. The court erred in giving the instructions which it did give to the jury.

5th. The court erred in overruling the defendant's motion for a new trial.

Miller for Defendant.

1st. The court very properly overruled the defendant's motion to quash and dismiss the writ. See 1st vol. Tidd. 687; Chitty's Pleadings, p. 279, and 282. 3 Cain's Rep. 219; King v. Shakspeare, 10 East, 83. The misspelling of the two names is not material, as they are of the same sound.

2d. The court very properly sustained plaintiff's objection to the introduction of proof of any arbitration or settlement between the parties after defendant had pleaded and issue joined. See 2 Tidd, p. 900, and notes; 7 Johnson, 194; Jackson on Demise: Calden v. Rich, 2 Espenass Rep. 504, after plea and issue joined, matter of defence arising subsequently, must be pleaded, and cannot be given in evidence, unless so pleaded. 1 Chitty, 697.

3d. The court very properly overruled the motion to instruct the jury as asked for by defendant, and did not err in instructions given. See 3 Starkie, 1046, and notes. The bill of exceptions does not show that there was no other proof. Foster and Foster v. Nowlin, 4 vol. Mo. Rep. p. 18. Parol proof of the agency of Yount is admissible, and the bet was made by Yount, as agent; principal may sue. See 11 Johnson, Vescher v. Yates, p. 23. Any agreement be-

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tween plaintiff and others after bet made, as to a participation in the bet, will not prevent plaintiff from recovery. See 13 Johnson, p. 88.

4th. That the court very properly overruled defendant's motion for a new trial.

Opinion of the Court by Tompkins, Judge.

Hutson sued Cato in the Circuit Court, where he obtained a judgment against him, to reverse which Cato comes into this court.

It appears on the record, that on the return of the writ the defendant below moved the court to quash the same, because in the declaration the plaintiff called himself Hudson, whereas the writ required the defendant to answer Hutson. This motion was overruled, and the defendant pleaded and went to trial.

The plaintiff in the Circuit Court gave oral testimony conducing to prove that he had made a bet of three hundred and fifty dollars with one Yount, on a horse race. He also gave evidence to prove that Yount made the bet with the plaintiff for and on behalf of Cato, the defendant, in the name of him the said Yount.

It was also proved that about three weeks after the making of the wager by Hutson with Yount, that he admitted, as associates, two men, to wit, one Taylor and one Anderson, who deposited their respective portions with the stakeholder, but there was no communication on the subject betwixt Yount and these associates of Hutson. The stakeholder testified, that Hutson and Yount placed in his hands an instrument of writing in these words: "Memorandum of a race to be run on the Marion track, on the 13th day of May next, in Cole county, Missouri, is this, that Joseph Yount agrees to run Cato's sorrel mare against Issac Hutson's bay horse, for the sum of three hundred and fifty dollars, and there is now in the hands of John Scruggs fifty dollars aside, for a forfeit, &c. Given under our hands, &c. this 11th March, 1837." Signed by Isaac Hutson and Jo-

seph Yount. It was proved that the race was won by Yount, and that the stakeholder, by Yount's direction, paid over to Cato the sum of money put into his hands by Hutson and his partners.

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The plaintiff in error, defendant in the circuit court, offered to prove that since the filing of the plea in this cause the whole matter was submitted to arbitration; and that the arbitrators made their award in favor of the plaintiff in error. The court excluded this evidence, and the defendant excepted. The defendant then prayed the court to give the following instructions, viz:

1st. If they believed that the said Taylor, Anderson, and Hutson, agreed to join their funds together, and that the same should be bet by the plaintiff for them, with the defendant, and that the said plaintiff did bet the same accordingly, and that the same was won by the said defendant and received by him, that then the action should have been brought by the said Anderson, Taylor, and Hutson, jointly, for the money so won, and that the plaintiff could not recover in the present action.

2nd. If they believed that the bet was made by the plaintiff and Yount, and won by Yount, yet although the money might have been paid over to the defendant, the plaintiff could not maintain his action against Cato, the defendant, for such money, but must seek redress against Yount, with whom the bet was made.

3d. That the jury ought to disregard all parol evidence given in the case as to the person with whom the plaintiff made the bet, and be governed, as to their finding, by the bond made by Hutson and Yount, and which had been read to them.

4th. If they believed that the plaintiff bet but one hundred and twenty-five dollars, then he had no right to recover more than that sum.

The circuit court refused to give these instructions, and gave the following, viz:

1st. If they believed that the plaintiff made the bet of three hundred and fifty dollars with the defendant, and after having made the bet, the said Taylor and Anderson agreed

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with him to become associated with him, there being no communication between Cato and the said Taylor and Anderson, and advanced to the stakeholder, Scruggs, the said Taylor, one hundred dollars, and the said Anderson, one hundred and twenty-five dollars, part and parcel of the said sum of three hundred and fifty dollars, that then the plaintiff had a right to recover of the defendant the whole sum of three hundred and fifty dollars.

2d. If they believe that the said Yount made the said bet for Cato, and was the agent of Cato in making the same, although it was made in the name of Yount, it was the bet of Cato, and they ought to find accordingly.

The defendant excepted to the several opinions of the circuit court, both in the refusing the instructions asked, and in giving those not asked by him. The defendant then moved for a new trial, because,

1st. The court rejected the evidence offered by the defendant of the settlement of the matter litigated by arbitration.

2d. The court misinstructed the jury as to the law of the case.

3d. The jury found a verdict contrary to the law and evidence.

It is assigned for error,

1st. That the circuit court refused to quash the writ in this cause on the defendant's motion.

2d. That the court refused to permit the defendant to prove that the matters in litigation had been settled by arbitration.

3d. That the court erred in refusing to give the several instructions asked, and also in giving those not asked by the defendant.

The plaintiff in error insists in his argument on each of the matters assigned for error.

The plaintiff's name in the declaration was written 'Hudson,' and in the writ 'Hutson.'

The first is that the court committed error in refusing to quash the writ, because the plaintiff's name in the declaration was written *Hudson*, and in the writ *Hutson*. It is by no means necessary to be here decided what is the correct manner of pronouncing these two letters, in which the name

of the plaintiff, as it appears in the declaration first, and in the writ secondly, appears to differ. It suffices for the purpose of deciding this point according to the rules of law, that the popular pronunciation of the two letters, which constitute the alleged difference or variance between the declaration and writ, is, in the word whether written *Hutson* or *Hudson*, precisely the same, the word being generally pronounced *Hutson*. It is thought then that the circuit court committed no error in overruling the motion to quash the writ.

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Variance held
immaterial.

2d. It is urged in the second place that the court ought to have permitted the plaintiff to prove that after the filing the plea (which was the general issue) that the whole matter in litigation had been submitted to arbitration, and that the award was in favor of the plaintiff in error, defendant in the circuit court. *

To sustain this point, the plaintiff in error relies on the 5th section of the act of 14th March, 1835, to restrain gaming, page 291 of the digest of 1835.

This section is in these words, viz: Any matter of defence under this act, may be specially pleaded, or given in evidence under the general issue. Most certainly the legislature have not in this act declared that differences arising between gamblers, of the several orders in the community, may be submitted to arbitration, and that the award of the arbitrators shall be obligatory on the parties; and if such had been the declaration of the legislature, the award should have been pleaded as made since the last continuance of the cause. The circuit court then it seems to me committed no error here.

3d. It is to be observed in the third place that it no where appears in evidence that either Anderson or Taylor who agreed to become associated with Hutson in the bet which he had made with Yount, had any communication either with Yount or with Cato, the alleged principal of Yount, on the subject of the wager. It does not appear then that the plaintiff in error can with any propriety complain that they were not co-plaintiffs in the action along with Hutson. The words of the act which give the remedy are very compre-

In an action to recover money won at gaming, under the provisions of the act to restrain gaming, the defendant will not be permitted to give in evidence under the general issue, matter of defence arising subsequent to the filing of the plea.

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If the bet was made in the name of the plaintiff, the fact that others were interested with him in the bet, does not make it necessary that they should join in the suit.

hensive. "Any person who shall lose any money at any game or gambling devise, may recover the same by action of debt." It might perhaps be correctly decided that, had they elected to sue each in his own name, for the money respectively deposited with the stakeholder, each might have maintained his action for his respective share; but they not having done this, seem tacitly to admit the right of Hutson to sue and recover. And it appears that a recovery under these circumstances by Hutson would be a bar to any recovery by them or either of them. It seems then that the circuit court committed no error in deciding that Hutson alone might maintain the action for the whole sum deposited with the stakeholder. It remains then only to be enquired under this head whether Catò or Yount ought to have been sued by Hutson.

Had the contract or bet been one which is recognised as lawful, or not contrary to the general policy of the law, the suit should, after the money was paid over to Cato by Yount, or by his order, have been brought against Cato, into whose hands the money had been transferred; and to me it appears that there can be no manner of impropriety in suing him on this contract, inasmuch as he whose agent in the affair Yount was, cannot be regarded as less an offender against the law of the land than Yount, who for him made the bet. Yount, had he been sued instead of Cato, might

Where a bet was made with defendant's agent, who did not disclose the fact that he was acting as agent at the time of making the bet, the action to recover the money lost was properly brought against the defendant.

not perhaps have been thought worthy of the favor extended by the courts to an agent in a lawful transaction who had paid over the money to his principal without notice of the plaintiff's intention to sue for money paid by him. But as Cato has been sued by the plaintiff, and especially as he has received the money, there seems to be no reason why the plaintiff below should not maintain his action against him. But it was contended in the argument of the cause that the agreement to run this race being by writing, under the seal of the parties, a covenant, that no parol evidence could be resorted to in order to prove that Cato, and not Yount, was the principal in the contract. This seems not to be the law. In 3 Starkie, p. 1045, it is said that evidence is admissible to prove that a deed was executed, or a bill of exchange made

at a time different from the date, or that a party in whose name a contract for the sale of goods was made, was but the agent of another. This is an action given to recover money won at gaming, and in its character is penal; and therefore the defendant, who is supposed to have been acting contrary to the policy of the law, would not be more favored than another principal whose agent had made a contract for him, the subject matter of which it was not contrary to the policy of the law to contract about. In this, then, as it appears to me, the circuit court has committed no error.

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Being then of opinion that the court gave no erroneous instructions and refused none that ought to have been given, the motion for a new trial (the overruling of which was also assigned for error,) which grew out of the refusal of the court to give some instructions, was also in my opinion overruled correctly.

For the reasons above given, the judgment of the circuit court ought in my opinion to be affirmed. And a majority of the court being of that opinion, it is affirmed.

GEORGE (a man of color,) v. ROOK.

In an action of trespass, under the statute, a general verdict will be decreed for single damages, unless the contrary appears.

Van Arsdell for Plaintiff.

1st. The court below erred in overruling the motion of the plaintiff to treble the damages found by the jury.

Opinion of the Court by Scott, Judge.

George instituted an action against Rook, under the statute to prevent certain trespasses, and obtained a verdict for forty-five dollars, the plaintiff moved the court to treble the damages. The court overruled the motion, and entered

AUGUST TERM, 1841. judgment for the damages assessed by the jury, *per curiam*.

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v.

Rook.

In an action
of trespass,
under the sta-
tute, a general
verdict will

A general verdict will be decreed for single damages, unless the contrary appears. *Withington v. Young*, 4 vol. Mo. R. 564; *Cooper v. Maupin*, 6 vol. Mo. R. 624; *Cross v. U. States*, 1 Gallison C. C. R. The judgment of the circuit court is therefore erroneous, and is reversed, and judgment is entered by this court in conformity to this opinion.

be decreed for single damages, unless the contrary appears.

DECISIONS
OF THE
SUPREME COURT OF MISSOURI.
SECOND JUDICIAL DISTRICT,

SEPTEMBER TERM, 1841.

SHEPHERD v. TRIGG.

Possession of personal property by the vendor after the sale, or by the mortgagor after the mortgage, is not fraudulent *per se* as against creditors and purchasers. It should be left to the jury to determine, from all the circumstances, whether the transaction was bona fide or fraudulent. (The cases of Rocheblanc v. Potter, 1 Mo. R. 531; Foster v. Wallace, 2 Mo. R. 231; Sibley v. Hood, 3 Mo. R. 280; and King v. Baily, 6 Mo. R. 576, so far as they conflict with this decision, are overruled.)

Error to La Fayette Circuit Court.

Todd & Wood for Plaintiff.

1st. The mortgage from decedent to defendant was void in law :

First, The mortgagor was largely indebted at the time of its execution. •

Second, The property remained with mortgagor, and never followed the deed.

Third, It contained a disposition of all his property to one creditor.

Fourth, The defendant's debt was fictitious, and not real.

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Fifth, There is no excuse or reason for the possession of the property not accompanying the deed.

2d. It became void as to creditors from matters post facto :

First, The property remained in possession of mortgagor from the date of the mortgage to his death, a period of nine years.

Second, The mortgagor used, sold, and disposed of it, as his own property.

3d. Because the fourth, fifth, sixth, and seventh instructions of the plaintiff were not given.

4th. Because the court erred in giving the instructions asked for by defendant :

First, It left with the jury to find as a fact, whether the mortgage was *in law void*.

Second, It asserted as law to the jury that, a knowledge in the plaintiff of its execution, concluded him, as to its legality.

Third, that if legally executed in the plaintiff's knowledge, no event or act could subsequently make it void as to the plaintiff.

5th. Evidence offered by defendant was illegally admitted :

First, The release purporting to be made by plaintiff and defendant jointly, to the deceased, was not proven to be executed by them.

Second, The original was not produced and proven.

Third, The mortgage from decedent to Thomas Hickman was irrelevant.

Fourth, Was incompetent, the original was not produced, or its execution proved.

Fifth, The proceedings by suit of Lamme & Hickman's heirs, against decedent, was irrelevant.

6th. The court erroneously overruled the new trial :

First, Verdict was against law.

Second, Against the weight of evidence. See *Foster v. Wallace*, 2 Mo. R. 231; *Hood v. Sibly*, 3 Mo. R. 290; *King v. Bailey*, 6 Mo. R. 575; *Gooche's case*, Cokes Reps. 61.

*Hayden for Defendant in Error.*SEPT'R TERM,
1841.

1st. That the mortgage from Stephen to Christopher Trigg, was a good and valid mortgage.

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Trigg.

2d. That the possession of the property remaining with the mortgagor, does not vitiate and render the mortgage fraudulent *per se*; but that at most it is only *evidence* of fraud. Snyder v. Hitt, 2d Dana, 204; Barrow v. Paxton, 5 John. 258; Bissell v. Hopkins, 3d Cowen R. 188; Cado-gan v. Kennet, 1 Coup. 432; U. S. v. Hood, 3d Cranch, 88; see also the authorities in 3d Cowen, in note 190, 192, 198; Steel v. Brown, 1 Taunt. R. 381.

3d. That the question of fraud in this case is a question of fact, and having been found by the jury not to exist in the cause, the judgment of the circuit court thereupon in favor of defendant ought to stand.

Opinion of the Court by Tompkins, Judge.

James Shepherd brought his action of assumpsit in the circuit court of Lafayette county, against Christopher Trigg. The judgment of that court being given for Trigg, Shepherd brings the cause into this court by writ of error, to reverse the judgment of the circuit court.

It appears by evidence preserved in the bill of exceptions, that Shepherd, the plaintiff, and Trigg, the defendant in the circuit court, had become security to Stephen Trigg, the father of the defendant, in a note made by them to Jane Heard, for the payment of about two hundred and eighty-one dollars. Jane Heard afterwards obtained a judgment against the makers of this note, and the sheriff of Howard county collected on an execution issued on this judgment from James Shepherd, the plaintiff in error in this suit, one hundred and sixty-nine dollars; the remaining part of the judgment on said note, made to said Heard as aforesaid, being paid by Christopher Trigg, defendant in error. Stephen Trigg, the principal in the note on which the above mentioned judgment was obtained, in satisfaction of which

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judgment Shepherd paid the aforesaid sum of \$169, died in the spring of the year of 1836, nearly five years after the payment aforesaid by Shepherd, the plaintiff in error, and to recover this sum of money paid as aforesaid by him, Shepherd commenced this action in the circuit court against Christopher Trigg, defendant in error. Stephen Trigg died in Saline county, and the administrator testified that he sold articles of personal property of the deceased to the amount of four hundred dollars, and that various other articles of property found at the intestate's residence, were retained by Christopher Trigg, the defendant in error, being claimed under a mortgage. Another witness proved, that the same articles were always retained in the possession of the intestate, Stephen Trigg, till his death, and used by him as his own; and that after the death of said Stephen, the defendant in error retained possession of them until they were sold by the sheriff to satisfy the mortgage. The amount of the sales was about six hundred dollars. The defendant in error lived in the family of the deceased.

The defendant in error then read in evidence two mortgages, both made by Stephen Trigg, the deceased; the one to Christopher Trigg, the defendant in error; the other to the said Christopher Trigg and James Shepherd, the plaintiff in error. The latter mortgage, i. e. that to the defendant and plaintiff in error, was made to secure them the re-payment of any money they might be compelled to pay in consequence of being security as aforesaid for said Stephen Trigg, in the note made by them to Jane Heard. This mortgage was given for the articles retained and sold as aforesaid by the defendant in error, and it recited the first mentioned mortgage, which had been made by said Stephen Trigg, in his lifetime, to the defendant Christopher Trigg, and by this instrument most of the articles which were mortgaged to the plaintiff and defendant in error for the purpose aforesaid, appeared to have been previously mortgaged to the defendant in error, Christopher Trigg. Evidence was given to prove that Shepherd, the plaintiff in error, was informed from other sources of the fact that Christopher Trigg, the defendant in error, had a mortgage

of older date for much of the same property which had been mortgaged to them, the plaintiff and defendant in error, for the purposes aforesaid. Evidence was also given by the defendant in error to show that this mortgage was given to secure to him the payment of so much money by him advanced and loaned to the intestate, Stephen Trigg.

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The jury were instructed, on the motion of the defendant in error, that if they believed that he never did take into his possession any property of which Stephen Trigg died possessed, other than the property conveyed to him by the said Stephen by mortgage, and that the said mortgage was not fraudulent, and that the said Shepherd knew of the said mortgage at the time he became the security of the said Stephen Trigg, then the mere act of Stephen Trigg's retaining the possession in pursuance of the terms of the said mortgage, does not render said mortgage fraudulent as to plaintiffs; and the taking such possession does not make him executor of his own wrong.

Three instructions were asked by the plaintiff, which the court refused to give. The substance of these was the reverse of that given in behalf of the defendant.

The leading cases decided in Missouri on this head, are in order of time, proceeding from the latest to the earliest: 1st, King v. Baily; 2d, Sibby v. Hood; 3d, Rocheblave v. Potter. In the case of King v. Bailey, the broad ground is taken, that if a vendee take a conditional bill of sale of goods, and leave them in possession of the vendor, the sale will, so far as creditors are concerned, be fraudulent. See page 580, of the 6th vol. of Mo. Decisions. In Sibby v. Hood, the same ground is taken; see page 290 of the 3d vol. of Mo. Decisions. And the case of Rocheblave v. Potter, 1 vol. Mo. Dec. page 561, is cited and relied on. The facts in the case of Rocheblave v. Potter are these: One Justus Terrill removed to Missouri, and settled in St. Louis county in the year 1818, bringing with him a slave, the subject matter of that suit. Terrill had also other slaves. In the year 1820, he visited the State of Louisiana, and there, on the 15th day of April of that year, executed a bill of sale to Potter for that slave and others. Immediately after the

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execution of this bill of sale, Terrill returned to his residence in St. Louis county, and there resided until the 10th day of February, 1821, when he died in the possession of the slave in question in that suit, and of the others named in the bill of sale; and by his will directed his executors to sell and dispose of the slave in question, along with the others named in the said bill of sale. The executors of Terrill, in pursuance of his will, advertised in one of the newspapers of the city of Saint Louis, and sold at public sale the slave in question. This slave was purchased by Mrs. Mary Lisa, and by her sold to Beebee, who sold to Rocheblave, the plaintiff in error, in the case cited. Thus it is seen that, for three years next after the sale of this slave in Louisiana to Potter, it remained in the possession of the vendor, Terrill, in Saint Louis county, when it was sold in pursuance of his will, the purchaser being ignorant of the sale to Potter. For we are told that the bill of sale made by Terrill to Potter, was not recorded in Saint Louis, and that neither Mrs. Lisa, Beebee, nor Rocheblave, had any notice or knowledge until after the sale and delivery of the slave to Rocheblave, of the existence of that bill of sale; for Potter, during all the intermediate time, had resided in Louisiana, and had never taken possession of the slave. The report continues, "many other facts were found which this court, in the view they take of the subject, need not now consider."

The supreme court, on the authority of this case, and also on the authority of the case of *Wallace v. Foster*, 2 Mo. Decisions, 231, declared in the case of *Sibly v. Hood* the law to be, that when the owner of personal property sells it to another person, either on a real or feigned consideration, and the property is nevertheless left in the possession of the vendor, creditors of the vendor are entitled to have such property sold to pay their debts. It may, however, be remarked, that in the case of *Sibly v. Hood*, it was not necessary to decide this point: for, at page 200 of the 3d vol., it seems that it did not appear in that case that Sibly, according to the agreement betwixt him and the holder of the property then in dispute, had any claim or lien on the property. In *King v. Baily*, it was decided that if the vendor be allow-

ed to retain possession of property after a conditional sale, SEPT'R TERM, 1841. it will be liable to be sold to pay the debts of the vendor.

The courts of the several states of this Union seem of late much divided in opinion, whether the possession continuing in the vendor is only *prima facie* evidence of fraud, and may be explained; or whether it be absolutely fraud, incapable of being explained. I am rather inclined to think, that where such decisions have been made, that they were made under the influence of strong feeling, excited by evidence such as was given in the case of *Rocheblave v. Potter*, above cited, otherwise the courts would, in all cases, permit the purchaser to introduce evidence to explain, if he could, why the possession did not accompany the right of property, or in other words, why the purchaser did not claim the possession of the purchased property.

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Possession of personal property by the vendor after the sale, or by the mortgagor after the mortgage, is not fraudulent *per se* as against creditors and purchasers. It should be left to the jury to determine,

In the case of *Rocheblave v. Potter*, a special verdict was found, and the court declared the law on that verdict. In *Sibly v. Hood*, the opinion of the court on the question of fraud was rather uncalled for, as the case might well have been decided on other grounds. There remains then, only two cases, i. e. *Wallace v. Foster*, and *King v. Baily*, which strongly support the doctrine, that in cases of sale possession must accompany the right of property in order to secure the purchaser's right of property against creditors of the vendor. I am inclined to believe that the better course would be in all cases to permit the purchaser to show cause why he left the vendor in possession of the property, even when there was an absolute sale. But the defendant in error in this cause claims to have the right to the property here under a mortgage deed where the possession of the intestate is consistent with the claim of the defendant in error. For much better reason, then, I am inclined to believe that the defendant in error ought to be allowed to prove that his claim to the property mortgaged was fair, and consequently that the instruction given by the circuit court at his instance was correct, and that the circuit court committed no error in refusing the instructions asked by the plaintiff in error.

from all the circumstances, whether the transaction was bona fide or fraudulent. (The cases of *Rocheblave v. Potter*, 1 Mo. R. 561; *Fosterv. Wallace*, 2 Mo. R. 231; *Sibly v. Hood*, 3 Mo. R. 290; and *King v. Baily*, 6 Mo. R. 576, so far as they conflict with this decision, are overruled.)

It is the opinion of all the court that the judgment of the circuit court ought to be affirmed, and it is accordingly affirmed.

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STONE V. MALOT.

Stone
v
Malot.

In an action under the act concerning "forcible entry and detainer," evidence concerning the "right of property" to the land in controversy is inadmissible.

Appeal from the Circuit Court of Platte County.

S. L. Leonard for Appellant.

1st. The court erred in giving the instructions asked by the plaintiff, for the following reasons, upon the supposition of facts contained in the plaintiff's instructions, the jury are required to find for the plaintiff, which is erroneous—because,

First, They are not required to find to be the fact :

First, That the plaintiff was in possession at the time of the entry of the defendant ;

Second, That the defendant entered upon the premises contrary to the will of the plaintiff ;

Third, That the plaintiff was entitled to the possession of the premises at the time of the institution of the suit ;

Fourth, That the defendant continued in the possession of the premises contrary to the will of plaintiff, from defendant's entry up to the time of the institution of the suit ; for it is necessary for the plaintiff to recover to establish each of the four preceding things. See sec. 2d and sec 18th, act of Forcible Entry and Detainer, Digest of 1835.

2d. This is only a possessory action, and the title cannot be inquired into. See sec. 18 and sec. 25, action of Forcible Entry and Detainer, Digest 1835. But the instruction is erroneous, because it treats of the title of pre-emption rights exclusively.

3d. The evidence shows the defendant to have been in the actual possession, under a pre-emption right, under the act of congress, approved June 1st, 1840 ; see the act. There is no pretence that he had parted with his right to the possession in any way ; which being the case, he cannot be moved, even though the plaintiff had a higher title in this form of action, it being merely a possessory action.

4th. The instruction is not warranted by the testimony.

The testimony shows that the plaintiff put Moore into possession; and Moore, after having right to the possession more than a year, put the defendant into possession for a valuable consideration, without notice of any claim of said Moore, (for no notice was proved, and none can be presumed,) so that there can be no pretence of a forcible entry by the defendant, as to the plaintiff.

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Malot.

But upon the hypothesis that this is a mere trial of the strength of pre-emption rights, then the instruction is erroneous; because,

5th. The evidence shows the defendant to hold a pre-emption under the act of June 1st, 1840; and the plaintiff, to recover, must show a right under the act of June 22d, 1838; but he cannot, because,

First, He did not reside on the land from February 22d, 1838, to June 22d, 1838;

Second, He was not the owner of the improvements during the same period, the right being in his son. He cannot recover under the act of June 22d, 1838, as amended by the act of June 1st, 1840, if he so held, because at the same time a right was vested in the defendant, that a right was vested in the plaintiff. But he cannot so hold, because,

First, He was not the owner of the improvements, and consequently, not holding in his own right, during the four months next preceding June 22d, 1838.

Second, To hold by cultivation, the cultivation must cover the same period required for residence, but the cultivation commenced in April or May, and did not extend back to February 22, 1838; nor did the tenant reside on the land the four months. See pre-emption laws, June 22d, 1838, and June 1st, 1840.

2d. The court erred in refusing the instructions asked by defendant; because,

First, The plaintiff put Moore in possession, and Moore put the defendant in possession through a purchase for a valuable consideration without notice, (for no notice is proven, and in the absence of proof the presumption is for defendant,) and therefore the defendant cannot be guilty of a forcible entry and detainer. But upon the hypothesis that

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the jury might find for the detainer alone, then the plaintiff should have given the defendant notice to quit. See sec. 3d, act Forcible Entry and Detainer, Digest 1835, and consequently the court should have given the 1st, 2d, and 8th instructions asked by defendant.

Second, In refusing the 3d, 4th, 5th, 6th, 7th, and 9th instructions asked by defendant for reasons assigned under the 3d and 5th clause hereinbefore contained.

W. T. Wood for Appellee.

The appellee will insist that there is no bill of exceptions copied in the record, embodying either the evidence or instructions given to the jury, and that this court cannot inquire into the errors as assigned, supposed to be based on the evidence and instructions given by the court. See papers of record, 6 vol. Mo. Reps. page 253, sec. semi-annual part.

But if the court should be of opinion that the papers, purporting to be the evidence and instructions copied in the transcript, are properly saved by bill of exceptions, then the appellee will insist, that there was no error in giving the instructions asked by the appellee, and no error in refusing the instructions asked by the appellant.

The appellee also insists, that this court ought not to reverse the judgment in this case, for errors in giving or refusing instructions to the jury on the trial, as the appellant made no motion to set aside the verdict and for a new trial. On this point see *Thompson v. Child*, 6 Mo. Reports, 162; *Montgomery v. Farrar*, 2d vol. Mo. Rep. 189; *Brun v. Dumay*, 2d vol. Mo. Rep. 125; *Davidson v. Peck*, 4th vol. Mo. Rep. 455; *Polk v. The State*, 4th vol. 544. See also 1st vol. Ky. Dig. 728, 732, 731, 730; 5th Little, 186; *Humphrey v. Jones*, 3d Monroe, 262; *Swartzwelder v. U. S. Bank*, 199 Marshall; 3 Little, 395, *Wall v. Nelson*; *Childs v. Stephens*, 3d Marshall, 347; *Brumfield v. Reynolds*, 4th Bibb, 426; *Tilley v. Moore*, Monroe 51.

*Opinion of the Court by Tompkins, Judge.*SEPT. TERM,
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This is an action of forcible entry and detainer commenced by Malot before a justice of the peace, against Stone. Malot got a judgment against Stone before the justice, and Stone appealed to the circuit court, where judgment being given against him, he appealed to this court. After the judgment of the circuit court, appears this entry: "The defendant files his bill of exceptions, which is signed, sealed and made part of the court." There is no signature of the judge after those words, nor is there any thing preceding them, betwixt them and the judgment of the circuit court.

The only thing like a bill of exceptions is an entry on the record in these words: "Be it remembered, that on the trial of the above forcible entry and detainer, the defendant offered to prove that the right of property to all the improvements in controversy, from the 22d of February, 1838, to the 22d June of that year, did not, during all said period of four months, reside in the plaintiff, but resided in William Malot, a minor son of the plaintiff, which was excluded by the court, to which the defendant excepts, and prays that it may be signed and sealed and made a part of the record;" then the name of the judge is subscribed with his official character.

The 25th section of the act concerning forcible entry and detainer, provides that the estate or merits of the the title shall in no wise be inquired into, in any complaint which shall be exhibited by virtue of this act. No injury, then, was done to the defendant by excluding this testimony, but on the contrary, the circuit court did no more than its duty, when it excluded the testimony.

The judgment of the circuit court must then be affirmed.

In an action under the act concerning "forcible entry and detainer," evidence concerning the "right of property" to the land in controversy is inadmissible.

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DAVIS v. WOOD.

Davis
v.
Wood.

1. The 2d section of 6th article of the act relating to Justices' Courts, (R. C. 1835, p. 362,) prescribing the manner of taking confessions of judgments, relates to confessions taken where there is no process.
2. The 19th section of 5th article of the constitution, and the 10th section of the 2d article of the act relating to Justices' Courts, directing that all writs and process shall run in the name of the "State of Missouri," are merely directory, and neither expressly makes void a writ not in conformity with its provisions. If the defendant appears and answers to the action, any defect in the writ, in this respect, will be cured. (Charless v. Marney, 1 Mo. R. 537; Fowler v. Walton, 4 Mo. R. 27; Little v. Little, 5 Mo. R. 227; Overruled on this point.)
3. The 14th section of the act relating to executions, (R. C. 1835, p. 255,) exempts from execution the necessary tools and implements of trade of any mechanic, *only* whilst carrying on his trade. If a mechanic conceives the design of absconding, and ceases the prosecution of his trade, the moment he leaves his trade, his tools and implements become subject to execution.
4. A. delivered the key of his house to B., not with the view to put the former in possession of the house, but only of the property therein contained. Held that B. had not such a possession as would enable him to maintain trespass for breaking and entering the house.

Error to Circuit Court of Saline county.

Todd for Plaintiff.

1st. That there was no judgment in one of the cases in the transcript of judgment offered. It contains a statement of debt and interest and costs; and the entry is "the defendant appeared and acknowledged that the above is just."

2d. The transcripts show no written confession of judgment signed by the party, and is void by statute. See Digest.

3d. The executions purporting to issue thereon, do not run in the name of the State, and are void. The caption of each is "State of Missouri, County of Saline, ss. to wit: To the Constable, &c."

4th. The law is, that the tools of a mechanic are exempt from levy by execution, the owner may lawfully sell them, although executions are in the hands of the officer.

5th. The instructions of the defendant misled the jury,

and were not predicated on any evidence, for the officer did not require the trespass, and did not perform it himself, and it was not done in aid of the officer.

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6th. The instruction of defendant is erroneous—that any lien existed in favor of the executions, before levy. See Mo. Digest, 362, 32, 258, 256, 337, 318, 319; Mo. Rep. 1 vol. 537; Fowler v. Watson, vol. 4th, 27.

Winston for Defendant.

1st. That the implements of trade and tools of Harlow were under the circumstances of the case liable to the lien of the executions in the hands of the constable, at the time they were sold to the plaintiff.

2d. That the defendant was justifiable in breaking into the house.

Opinion of the Court by Scott, Judge.

The plaintiff brought an action of trespass *quare clausum fregit*, against the defendant for breaking and entering his close, and taking away his goods. The defendant pleaded not guilty and justification, alleging that he acted as agent of one Thomas Duncan, who had obtained two judgments against one Harlow, on which executions were issued and delivered to the constable. That the said Harlow had goods locked up in the house in the declaration mentioned, and that the plaintiff was requested to open the door of the house, that the executions might be levied, which he refused to do; and that therefore the said defendant by the commandment, and in aid and assistance of the constable, opened the door of the house, and thereupon the constable entered and seized the goods.

It appears from the evidence preserved in the cause, that, the defendant, as agent for Thos. Duncan, obtained two judgments and executions against one Harlow. Harlow was a wheelwright. A short time before the levy of the executions, he went to the plaintiffs in the night, and told them he was indebted to them, and that he was about to leave the

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neighborhood, that he would deliver them the key of his shop, that they might have the property left in it to pay themselves, and the key was delivered. Harlow left the neighborhood that night clandestinely, and has not been since heard of. He carried on his trade until he absconded. The goods were locked up in the shop he had occupied and consisted mostly of the implements of his trade. That shortly after Harlow absconded, the defendant, with the constable, came to the plaintiffs and demanded of them the key of Harlow's shop, in order that he might get the goods in it to satisfy the executions. The plaintiffs refused to deliver the key, alleging that the house was in their possession, and that they owned the goods, having purchased them of Harlow. The constable then declined breaking open the door, but told the defendant if he would open the door, he would levy on the goods found in the house. The defendant then forcibly raised the door off the hinges, and then the constable entered, and seized the property and sold it. Upon the trial, the plaintiffs submitted to a nonsuit, and afterwards moved to set it aside for the misdirection of the judge, and because improper evidence was admitted. The judgment offered in evidence, after stating the names of the parties, and the proceedings on the summons, runs thus, "the defendant appeared and acknowledged that the above is just on the day of trial; also, 81½ cents for justice's costs. Given under my hand, &c." The plaintiff's counsel contends that the above is not such a confession as is required by the

The 2d sec. statute. The act concerning justices' courts, article second, of 6th art. of section four, says: Suits may be instituted before a justice, the act relating to justices' courts, either by the voluntary appearance and agreement of the parties, or by process. The second section of the sixth article, prescribing the manner of taking confessions of judgments, relates to confessions taken where there is no process. In this case there was process, and the party appeared on the day of trial, and acknowledged the justice of the demand. If he had appeared and said nothing, or had refused to appear, the demand being liquidated, judgment would have been rendered against him. An express acknowledgment of the justice of the debt must have as much weight as a

refusal to answer it. It is also objected that there was no judgment entered on the confession. This court in the case of *Rutherford v. Winn*, 3d vol. Mo. Reps. says, It will give the effect of a judgment to the verdict of a jury, so soon as it is entered on the docket of the justice. This principle is applicable to the question under consideration. The counsel for the plaintiffs also objected to the admission of the executions in evidence, because they did not run in the name of the State. It may well be questioned whether that clause which directs that writs and process shall run in the name of the State, as it also requires all writs to be tested by the clerk, is not applicable alone to writs issued from the higher courts and courts having a clerk. But however this may be, the statute concerning writs directs that those emanating from justices' courts shall run in the name of the State. In our government, jurisdiction is conferred by the constitution, and on the superior and inferior courts; and writs are only part of the machinery employed by courts for the exercise of the jurisdiction with which they are invested. It is not perceived how a writ wanting a constitutional requisite is more defective than a writ wanting a statutory one. The constitution as well as the statute is merely directory, and neither the one nor the other expressly makes void a writ not in conformity to its provisions; and if it be said the justice is sworn to support the constitution, so too he is sworn to observe the laws prescribed for the government of his official conduct. If the court has jurisdiction of the subject matter, any irregularity or error in the process will not make the officer, nor those acting under him, trespassers.

Notwithstanding the error, it is a justification. *Miller v. Brown*, 3d vol. Mo. Rep. 127. The judge on the trial instructed the jury, that if they believed from the evidence, that the property was Harlow's, and that it was in his possession whilst the execution was in the hands of the officer unsatisfied, then the execution was a lien upon the property, and Harlow could not defeat the claim of the plaintiff in the execution by a sale of the same. That the implements of trade and necessary tools of any mechanic whilst carrying

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The 19th s. of 5th article of the constitution, and the 10th sec. of the 2d art. of the act relating to justices' courts, directing that all writs and process shall run in the name of the 'State of Missouri,' are merely directory, and neither expressly makes void a writ not in conformity with its provisions. If the defendant appears and answers to the action, any defect in the writ, in this respect, will be cured.—(Charles v. Marney, 1 M. R. 537; Fowler v. Watson 4 Mo. R. 27; Little v. Little, 5 Mo. R. 227. Overruled on this point.

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Wood.

The 14th s. of the act relating to executions, (R. C. 1835, page 225) exempts from execution the necessary tools and implements of trade of any mechanic, only whilst carrying on his trade. If a mechanic conceives the design of absconding, and ceases the prosecution of his trade, the moment he leaves his trade, his tools and implements become subject to execution.

A. delivered the key of his house to B. not with

the view to put the former in possession of the house, but only of the property therein contained.—Held that B. had not such a possession as would enable him to maintain trespass for breaking and entering the house.

on his trade, are exempt from execution, but if a mechanic conceives the design of absconding, and ceases the prosecution of his trade, the moment he leaves his trade his tools and implements become subject to the lien of an unsatisfied execution of an officer. The jury was farther directed that they must believe from the evidence, that the possession of the house was in the plaintiffs, to enable them to recover. Without determining whether an execution in the hands of a constable is a lien on the property of the defendant in the writ, before an actual levy of the same, it is the opinion of the court, that the last instruction to the jury was correct; and from the evidence preserved in the bill of exceptions, it does not appear that the plaintiffs had possession of the house, the forcible breaking and entering of which they complain. The delivery of the key of the house was not made with a view to put them in possession of it, but of the property therein contained. There is no evidence that the plaintiffs were possessed of the house, nor do they prove any title to it, which if the house was vacant might have drawn to it the possession, and the taking and converting the property being laid in the declaration as a mere aggravation, by their failure to prove a right to maintain trespass for breaking and entering the house, which is the gist of the action, the whole action fails, and they cannot recover in respect of matter laid in aggravation. See Starkie, 814.

Judgment affirmed.

KINCAID V. LOGUE.

Where one is in possession of a part of a tract of land, the whole of which is his own property, the possession of a part is the possession of the whole. Otherwise where he is a mere trespasser, in which case his possession would be bounded by his actual occupancy.

Appeal from the Circuit Court of Platte county.

SEPT'R TERM,
1841.

Stuart & Miller for Plaintiffs.

Kincaid
v.
Logue.

1st. An entry upon the possession of another (with or without title) without his consent, is in contemplation of law a forcible entry. 4 Bibb, 389, 426; 3 Marsh. 347.

2d. That from the evidence in this case, the plaintiff, Kincaid, had such possession of the land mentioned in the complaint, as would entitle him to maintain the action of forcible entry and detainer, and that the court erred in refusing him a new trial.

3d. That the possession of land is not limited, in contemplation of law, to such part as may be in actual cultivation, or has been appropriated by the person in possession to his own use, by labor or improvement thereon, but such possession extends to the boundaries of the tract upon which he has his improvement. 4 Bibb, 389 and 426; 3 Marsh. 347; 3 Lit. 398; 1 Monroe, 52; Boyce v. Blake, 2 Dana, 12.

4th. That if Kincaid had possession of the land, no matter with what intention he took possession, the defendant could not lawfully forcibly enter upon and detain the same from him.

5th. That the court erred in overruling the plaintiff's motion for a new trial, and in arrest of judgment.

Burnett for Defendant.

1st. The court did not err in giving the instructions given to the jury.

2d. The court committed no error in refusing the instructions offered by the plaintiff.

3d. The court committed no error in refusing to grant a new trial.

Opinion of the Court by Tompkins, Judge.

Kincaid commenced his action for forcible entry and detainer against Logue, before a justice of the peace, and removed the cause by writ of certiorari to the circuit court of

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1841.

Kincaid
v.
Logue.

Platte county. In that court a verdict was found, and judgment given for the defendant, and to reverse this judgment the plaintiff appeals to this court.

The bill of exceptions shows, that about the year, 1837, Kincaid, plaintiff and appellant in this cause, claimed the exclusive possession of the land in his complaint to the justice mentioned, about eighty acres; that he had bought an improvement made on it by one Brooks: that along with this land the plaintiff, in the fall of the year 1837, had inclosed about two hundred and forty acres of land, with the worm of a fence, and a fence built on said worm; that in some places said fence was three or four rails high, in others two, and in others one rail high; that there were gaps in said fence in several places; that several public roads ran through said land enclosed as aforesaid; that the plaintiff, Kincaid said his object was by the enclosure to make pastures; and to keep off intruders; that the defendant entered into this land after said enclosure was made, without the consent of the plaintiff; that all the land claimed by Kincaid belonged to the United States; that within this land enclosed by Kincaid, and claimed in this suit, Kincaid had built a cabin, and that Logue had also built a cabin within such enclosure; that Logue's cabin was situated about three or four hundred yards from that of Kincaid; that Kincaid cut timber on said land, and did other acts by which he manifested his claim to the right of possession of the land; that the worm of said fence was made of logs and poles, in many places of unequal lengths and sizes, some ten and others twenty feet long.

A witness on the part of the defendant stated that the fence was as represented by the plaintiff's witnesses, except that in some places there was no rail on the worm, and that the worm was so stretched that it would be difficult to make a fence stand on it without propping.

The plaintiff prayed the court to give the jury these instructions, viz:

1st. If they find that the defendant took possession of a part of the quarter section in the name of the whole, it amounts to a possession of the whole by him.

2nd. If they find the plaintiff did any act or work on the land in fencing, or otherwise, with the intention to take the possession of the quarter section, the intention governs the possession, and they must in that event find for the plaintiff.

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1841.

Kincaid
v.
Logue.

These instructions were refused. Several other instructions of the same import were asked and refused. These instructions required the court to tell the jury generally that if they found that the plaintiff exercised the rights of ownership by cutting timber, making rails, &c. laying the worm of a fence, &c., with the intention to take possession of the land to his own use, and to the exclusion of others; in such case they must find for the plaintiff. All these instructions the court refused to give. The court, on motion of the plaintiff, gave this among other instructions: If they find the plaintiff had laid the worm of a fence entirely around the land in controversy, and that the plaintiff enclosed within said fence lands on which the plaintiff was entitled to pre-emption, and also other public lands, and had put up a fence, from one to four rails high around a part of the said land, and was preparing to raise said fence, up to, and at the time the defendant entered, and that the defendant did enter into said field or enclosure, as charged in the complaint, they must find for the plaintiff.

The court of its own accord instructed the jury that if they believed from the evidence, that the plaintiff had a settlement or field on the public land in the complaint mentioned, and was in the possession of the same at the time of the alleged forcible entry and detainer, and that the defendant entered thereon, contrary to the will of the plaintiff, they must find for the plaintiff.

Other instructions were given and refused. To write them out, would be to repeat the same thing in other words. On these instructions, the jury found for the defendant.—

When a man is in possession of part of a tract of land, the whole of which is his own property, the possession of a part is the possession of the whole. But when a man is in possession of land to which he has no title, and on which he is a mere trespasser, the court is liberal indeed that gives a right of possession against other wrongdoers to such quan-

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v.
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tity of land as he can conveniently cultivate and occupy for pasturage. The history of this worm, and the rails put on it, (for it deserves not the name of a fence,) is given mostly by plaintiff's own witnesses, and he must be good natured to excess who can read it, and believe that Kincaid honestly designed to enclose that ground for pasturage. But he declares, according to the statement of Jones, his own witness, that his intention in enclosing said land, was to make pasture, and keep off intruders. Who could be a more notorious intruder than himself? who claims the right to possess and occupy the land of the United States, because he had cut down timber for several years on such land, without any visible object but to make this worm of a fence, on which even a child ten years old might know a fence could not be built to confine horses or cattle.

The jury found very correctly, as it seems to me, that the defendant was not guilty as charged. There was in my opinion abundance of evidence to warrant the finding, and the court, in my opinion, committed no error, either in refusing a new trial, or in giving or refusing instructions. Its judgment ought then in my opinion to be affirmed, and that being the opinion of all the court, it is affirmed.

SLOANE V MOORE.

In an action under the statute concerning "forcible entry and detainer," by a settler on the lands of the U. S., against one who had settled on an unenclosed part of the tract in controversy, bare possession, without any right of pre-emption, will not bring the plaintiff within the provisions of the 29th section of the act.

Appeal from the Platte Circuit Court.

Miller & Wood for Appellant.

The instructions as given by the court below assume the ground that the proceedings by forcible entry and detainer, cannot be sustained to recover the possession of unenclosed

public land, and this seems to be the only point presented by the record, for the decision of this court. SEPT. TERM,
1841.

That forcible entry and detainer can be maintained in such case, see Revised Statutes of Mo. page 281, sections 28 and 29, on that page. See also, *Matlox v. Helen*, 5 Little, 186; *Wall v. Nelson*, 3 do 395; *Chiles v. Stephens*, 3 Marshall, 345-7; *Brumfield v. Reynolds*, 4 Bibb, 388; *Young v. Rurge*, 1 Little, 226, *Beauchamp v. Morris*, 4 Bibb, 312, *Carpenter v. Shepherd*, *ibid*, 501; *Van Horne and others v. Telley*, 1 Monroe, 51; 4 Bibb, 424; 2 J. J. Marshall, 385; 4 Bibb, 563; *Thomas v. Harrow*, 1 Mar. 61 and 189; 2 J. J. Marshall, 257; *Bank of Kentucky v. McWilliams*, 1 Marsh. 347; *Calk v. Sim's heirs*, 3 do. 615; 1 do. 375; *Kendall v. Slaughter*, 3 do. 99; *Bowman v. Bartlett*, 5 Little's Rep. 210; *Smith v. Morrow*, 3 do. Rep. 20. The cases here referred to fully sustain these positions, that, in the proceeding by complaint for forcible entry and detainer, nothing is in issue but the naked fact of possession. That although deeds are permitted to be introduced as evidence, it is only to show the boundary and extent of possession, but not to show right. That there may be such a possession in fact of unimproved and unenclosed land as will enable the possessor to maintain the writ of forcible entry and detainer against those who invade it.

Sloane
v.
Moore.

That the actual residence upon a part of a tract claiming the whole, is a possession of the unenclosed part. That it is the intention which governs the extent of possession, and this without reference to the right or title of the party so intending to claim.

Burnett for Appellee.

1st. That the court committed no error in refusing instructions of the plaintiff.

2d. That the court did not err in giving the instructions given to the jury.

3d. That the court did not err in overruling plaintiff's motion for a new trial.

The possession to sustain this action must be actual, 1 Ky. Statutes, 731-2 1 Hawkins, 508, 5, 46; 3 Chitty's C. L.,

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1841.

Sloane
v.
Moore.

1136, note C; 1 Russell, 246-7, top, cited in note; 11 Wendall, 158; must be definite as to boundary, 1 Marshall, 28, 106, 208; must be quiet and peaceable, 3 Chitty's C. L., 1134, note B.

Opinion of the Court by Tompkins, Judge.

Willam Sloane sued James Moore in an action of forcible entry and detainer, and before any judgment therein, removed the cause by writ of certiorari into the circuit court of Platte county. Judgment being there given against him, he appealed to this court. On the trial of the cause, it was in evidence, that some time in the latter part of the year 1838, Sloane, the plaintiff, built a cabin on the land in controversy, and removed with his family into it, and has ever since resided there. That in the spring or summer of the year following, the defendant Moore built in the neighborhood, and within two hundred and fifty yards from the plaintiff's improvement, a cabin, and moved into it, and has ever since occupied it. That according to the surveys made, a quarter section will include Moore's house, if Sloane's house be made the centre.

The plaintiff below, appellant here, moved for a new trial and instructions.

In an action under the statute concerning "forcible entry and detainer," by a settler on the lands of the U. S. against one who had settled on an unenclosed part of the tract in controversy, bare possession without any right of pre-emption, will not bring the plaintiff within the provisions of the 29th section of the act.

It is contended that by the 29th section of the act concerning forcible entries and detainers, the plaintiff is entitled to bring this action against any person who settles so near him, that his house would be covered by a quarter section of land, of which the plaintiff's house is the centre. Where no legal survey has been made at the time of settlement the act does give this right to one who is entitled to a right of pre-emption. It is not pretended that there was any act of congress by which Sloane, when he made this settlement, was entitled to a pre-emption; and it would be a curious thing for a court of law, to decide in anticipation of such a law, (which may never be passed,) what such court could decide by authority of the statute only. This case is like the case of Kincaid v. Logue, decided at this term. The

same instructions which the judge gave in that case, apply to this, except that the jury are not in this case embarrassed with a pretended fence.

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1841.

Jones
v.
Cox & others

The court, in my opinion, instructed the jury very well, having instructed them as in the case of Kincaid v. Logue, and the jury had abundance of evidence too to warrant their finding in pursuance of the instructions given. The judgment is therefore affirmed.

JONES v. Cox and others.

1. Where the summons varies from the declaration the court may permit the former to be amended, and it is no ground for a continuance. A variance between the declaration and the writ cannot be taken advantage of, on a motion to quash.
2. More than one note or bond may be set out in a petition in debt. The several bonds or notes may be considered as several counts.

Appeal from the Circuit Court of Benton County.

English for Appellant.

The defendant below, and appellant in this court, contends that the court below erred:

1st. In granting permission to the plaintiffs to amend the writ of summons, by inserting the name of the third plaintiff therein, after the writ of summons had been set aside by the court.

2d. In ordering the defendant to plead at the return term, after such an amendment being made.

3d. In giving judgment upon the demurrer for the plaintiff instead of for the defendant.

Winston for Appellee.

1st. That the court below committed no error in permitting the plaintiffs to amend their writ. See Rev. Code, 468.

2d. That the petition is not defective either in form or substance.

SEPT. 2 TERM,
1841.*Opinion of the Court by Scott, Judge.*Jones
v.
Cox & others.

The defendants in error brought suit by petition in debt against the plaintiff in error, and obtained judgment. It appears that the petition commenced by stating that the plaintiffs were the legal owners of *two notes* against the defendant, and then set out two notes and concluded in the usual form. The summons sued out on the petition omitted the name of one of the plaintiffs. At the return term of the writ, the plaintiff in error moved to set aside the writ for the variance between it and the petition; which motion was sustained, and the court immediately thereafter gave the defendants in error leave to amend their writ by inserting the name omitted; to which the plaintiff in error objected. The plaintiff in error then demurred specially to the petition, assigning as a cause for the demurrer, that the petition was double, in this, that it contained two causes of action in one and the same count. The demurrer was overruled, and judgment for the defendants in error, from which they have appealed to this court. The errors complained of are: the granting of leave to amend the writ, and the overruling of the demurrer. If a variance between the declaration and writ can be taken advantage of at all, it is not seen

Where the summons varies from the declaration the court may permit the former to be amended, and it is no ground for a continuance. Variance between the declaration and the writ cannot be taken advantage of on a motion to quash.

on what principle a party can avail himself of it by a motion to quash; according to our practice the declaration is filed before the writ issues; and the declaration being the foundation of the writ, and accompanying it, the party would look to it in order to ascertain the nature of the demand against him, and by whom it was instituted. A variance between it and the summons cannot mislead him. As to the objection that the court set aside the writ, and then gave leave to amend, this was irregular, as it appears that the court the same instant gave the party leave to amend. The proper construction of the act of the court must be, that the motion to set aside was overruled, and leave given to amend. This is the legal effect of it. For the leave to amend impliedly set aside the order quashing the writ, and as the plaintiff in error was present, and objected at the time, he cannot complain of any surprise or injury occa-

sioned by quashing the writ, and afterwards giving leave to amend it. The court properly gave leave to the party to amend, and as the amendment was of such a nature as to produce no surprise to the plaintiff in error, he was not entitled to a continuance. As to the objection that there were two notes set out in the petition, it is not perceived on what principle it is based. Several counts on different bonds may be joined in the same declaration in an action of debt; 1 Saunders, 288; and in a petition in debt, the several bonds or notes may be considered as several counts.

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1841.

Jones
v.
Cox & others.

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Let the judgment be affirmed.

CANIFAX V. CHAPMAN & WILLS.

1. If the jury, in the trial of the right of property at the instance of the constable, find a verdict, the authority of the constable, in relation to the trial of the right of property, is at an end; and a subsequent finding by a jury, in another trial, contrary to the first finding, is no indemnity to the constable.
2. In trespass all are principals, and those who direct a trespass, or assist to a trespass for their benefit after it is done, are equally liable with those who actually commit it.

Appeal from the Circuit Court of Green County.

Phelps for Appellant.

The court erred in giving the instruction:

1st. Because the plaintiff had proved himself the owner of the property; that Wills took, and by the command of Chapman, sold it. Chapman commanded the trespass to be done, and therefore is liable, whether he bought the property or not. 1 Ch. Pl. 181.

2d. The trial of the right of property the two last times was illegal. A verdict between the parties is conclusive as to that matter. Phil. Ev. 123; *ibid* 236; *Felter v. Miller*, 2d J. R. 181. In the case cited from Johnston, there was a verdict for defendant, but no judgment. In another suit between the same parties for the same cause of action, this verdict was held to be a bar.

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1841.

Canifax v.
Chapman &
Wills.

3d. Admitting the last trial to have been proper, still it was no justification to the defendant Chapman. The trial of the right of property by a constable, is a creature of the statute, the verdict can justify the officer only, and not the plaintiff in the execution. *Little v. Seymour*, 6 M. R. 166.

Winston for Appellees.

1st. Whether Chapman's leaving the property mortgaged in the hands of the mortgagor, did not render the mortgage fraudulent and void against creditors?

2d. Could there be two trials of the right of property between the same parties?

3d. Did the court err in giving the instruction?

Opinion of the Court by Scott, Judge.

Canifax sued Chapman and Wills in trespass for taking and converting his goods, plea not guilty, and verdict and judgment for the defendants. Wills was constable and had an execution against one Smith, in favor of Chapman, who directed him to levy on the goods in the declaration mentioned. Upon a claim being interposed by Canifax to the goods, the constable summoned a jury to try the right of property to the goods between Smith and Canifax, and the jury found the goods to be the property of Canifax. The right of property to the goods was again tried, and a like verdict was rendered; there was a third trial, and the jury found the right of property to the goods in Smith. On the trial the court instructed the jury that unless they believed the defendant Chapman purchased the property sold by the defendant Wills, or some part of it, they must find for the defendants. This instruction was excepted to, and the giving of it is the error assigned. After the constable had once obtained a verdict in a trial of the right of property to the goods, his authority in relation to the trial of the right of property, was *functus officio*, and a subsequent finding by the jury that the property was Smiths, contrary to the first finding, was no indemnity to him. In trespass all are prin-

If the jury, in the trial of the right of property at the instance of the constable, find a verdict, the authority of the constable, in relation to the right of property, is at an end; and a subsequent finding by a jury, in another trial, contrary to the first finding, is no indemnity to the constable.

cipals, and those who direct a trespass, or assent to a trespass for their benefit after it is done, are equally liable to the action with those who actually commit it. The instruction was clearly wrong.

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1841.
Canifax v.
Chapman &
Mills.

Let the judgment be reversed.

In trespass all are principals, and those who direct a trespass, or assent to a trespass for their benefit after it is done, are equally liable with those who actually commit it.

THE STATE V. SHOEMAKER.

1. Indictment for forgery in the second degree, under the 21st sect. of 4th article of the act concerning crimes and punishments. The jury found the defendant guilty, "in manner and form as charged in the within indictment." Held, that as under this indictment the defendant could not be convicted of any inferior degree of forgery, it was unnecessary for the jury to specify in their verdict of what degree of the offence they found the defendant guilty.
2. The 14th sect. of the 9th art. of the act concerning crimes and punishments, (R. C. 1835, p. 214,) providing, that the jury may find the defendant guilty of any degree of the offence inferior to that charged in the indictment, does not change, in this respect, the rule of the common law, that the allegations and proof must correspond. If such inferior degree be included in the allegations in the indictment, then the statute applies; otherwise when the inferior degree is not so included, and is of a totally dissimilar nature from that charged in the indictment.
3. The indictment charged the counterfeit coin to be in imitation, &c., of coin, &c., of "the State of Missouri," "called a Mexican dollar." Held: that the indictment was defective, as the words "State of Missouri" were contradictory and repugnant to the subsequent part of the description, and being descriptive of a material part of the offence, could not be rejected as surplusage.
4. The 7th sect. of the 4th art. of the act concerning crimes and punishments, (R. C. 1835, p. 184,) providing, that, "Every person who shall counterfeit, &c. any gold or silver coin, at the time current within this State, by law or usage," &c., means that the genuine coin must be current in this State, at the time the counterfeit is made. If the genuine coin should, after the counterfeit has been made, go out of circulation, the attempt to pass the counterfeit would still be an offence under the 21st sect. of said article.

SEPT'R TERM,
1841.

Error to the Circuit Court of Jackson County.

The State
v.
Shoemaker.

Young, Circuit Attorney.

The first and second counts, it is believed, are defective; but it is contended that the third count is good; if so, the court should have given judgment against the defendant. See 1st Chit. Cr. Law, page 205, and 522, side paging; the People v. Curling, 1st John. Rep. 320. Authorities cited to sustain the indictment: Revised Statutes of Mo. 1835, sect. 7, p. 184, and sec. 21, p. 187; Chit. Cr. Law, 238-9, side paging; Hildebrand v. The State, 4th semi annual part, 5th vol. Mo. Reps. 550; Arch. Crim. Plead. 55-56.

French & Sawyer for Defendant.

1st. That it is not alleged in either the first or second counts, that the counterfeit coin were uttered and passed as true. See Statute Crimes and Punishments, art. 4th, sec. 21.

2d. Because the second count alleges that the counterfeit coin passed was in imitation of a piece of silver current in this State, omitting the word coin. See Statute Crimes and Punishments, art. 4th sec. 7, and same art. sec. 21.

3d. Because there is no venue laid to the allegation of the fact, that the counterfeit coin passed was made in imitation of coin current in this State.

4th. Because it is not alleged in said third count, that the counterfeit coin passed, was in imitation and similitude of any coin current in this State at the time the same was passed.

5th. Because the jury have not found of what degree of forgery the defendant is guilty. Practice in criminal cases, art. 7th, sec. 1st.

6th. Because it is not alleged in said third count, that the coin passed was made and counterfeited in imitation of a piece of money and coin of the State of Missouri.

Opinion of the Court by Napton, Judge.

Joseph Shoemaker was indicted by the grand jury of

Jackson county for forgery. The indictment contains three counts, all framed upon the 21st section of the 4th article of the act concerning crimes and their punishment; the two first counts, containing a charge of passing as true counterfeit money; and the third count for attempting to pass counterfeit money. The two first counts are abandoned as defective; and the verdict of the jury being only on the third count, it is necessary only to state the substance of the last count. That count charged, that the defendant on, &c., at, &c., one piece of false and counterfeit money and silver coin, made and counterfeited in imitation and similitude of a piece of good, legal, and current money and silver coin of this State, called a Mexican dollar, of the value of one dollar, at that time current within this State by law and usage, and in actual use and circulation within this State, then and there, feloniously, did offer and attempt to pass, utter and publish as true, to one B. P. Franklin, with intent then and there him the said Franklin to defraud, he the said defendant at the time when he so offered and attempted to pass as true said false and counterfeit money and silver coin; then and there well knowing the same to be false and counterfeit, against the form, &c.

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1841.
The State
v.
Shoemaker.

Upon this indictment the defendant was tried and the jury found him guilty "in manner and form as charged in the indictment, and assessed his punishment to imprisonment in the Penitentiary for seven years." The defendant moved to arrest the judgment because of defects in the indictment, which motion was sustained by the court, and the court, upon the evidence given, ordered the defendant into the custody of the sheriff to await the further prosecution of the offence. The circuit attorney excepted to the opinion of the court in staying the judgment, and brought the record to this court by writ of error.

The defendant in error relies upon two grounds to maintain the opinion of the circuit court in arresting the judgment; material defects in the indictment, and a defective verdict. I will first examine the objections to the verdict.

The 14th section of the 9th article of the act concerning crimes and punishments, provides, that upon an indictment

Indictment for forgery in the second degree, under the 21st sect. of 4th art. of the act concerning crimes and punishments. The jury found the defendant guilty, "in manner and form as charged in the within indictment." Held, that as under this indictment the defendant could not be convicted of any inferior degree of forgery, it was un-

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1841.

The State
v.
Shoemaker.

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for any offence, consisting of different degrees, as prescribed by this act, the jury may find the accused not guilty of the offence charged in the indictment, and may find him guilty of any degree of such offence, inferior to that charged in the indictment, or of an attempt to commit such offence." The first section of the 7th article further provides, that "upon the trial of any indictment for any offence, where by law there may be conviction of different degrees of such offence, the jury, if they convict the defendant, shall specify in their verdict of what degree of the offence they find the defendant guilty."

The proper construction of these sections, was incidentally noticed by this court in the case of Watson (5 Mo. R. p. 497;) in the case of Mallison, (6 Mo. R. p. 399;) and in Plummer's case, (6 Mo. Rep. 240.) It was held by the court in those cases, though the point was only collaterally before them, that the fourteenth section could not have been intended to dispense with the rules of the common law, and I may add, of common justice, that the allegation and proofs must correspond. If the inferior degree of offence, of which the party is convicted, be included in the allegations of the indictment, a conviction of such inferior degree is consistent with established principles. But if the other offence be of a totally dissimilar nature, and no count in the indictment contains any description of the inferior offence proved, no judgment could be given against the defendant upon such proof. If, for example, the indictment charges a forgery in the second degree, which our statute declares to consist in counterfeiting coin, or in passing or attempting to pass such coin, the defendant cannot be legally convicted of forgery in the third degree, which consists in making false entries in books with fraudulent intent, &c.

In this case the jury found the defendant guilty in manner and form as charged in the indictment. The indictment charged the crime of forgery in the second degree. An examination of the other degrees of that offence, specified in the statute, inferior to the second degree, makes it apparent that the defendant could not, under this indictment, have been found guilty of any inferior degree of forgery; it

was, therefore, perfectly unnecessary for the jury to specify, of what degree of forgery they found the defendant guilty. The allegations of the indictment, described the second degree of forgery alone, and finding these allegations true, they necessarily found him guilty of the second degree of forgery. The assessment of the punishment is also consistent with such finding. The verdict of the jury was therefore legal, and no cause for arresting the judgment.

Two objections have been taken to this indictment. It is first objected, that the money charged to have been counterfeited, was in imitation and similitude of a "piece of good legal and current money and silver coin of the State of Missouri." The objection is technical, but it has not the less force on this account, in a criminal case, where the courts are bound to see even the technicalities of the law complied with. It is plain that the words "of the State of Missouri," cannot be rejected as surplusage, they being a description of a material part of the offence. The expression is contradictory and repugnant to the subsequent part of the description, where the prosecutor describes the coin as a Mexican dollar, current within this State by law and usage. If these contradictory and repugnant expressions did not enter into the substance of the offence, they might be rejected as surplusage. 1 Chitty Cr. Law, 238. Or if the prosecutor, after describing the coin counterfeited, as a Mexican dollar, current within this State, had pursued his description by representing the same as a silver coin of the State of Missouri, the latter expression might have been rejected as inconsistent with, and repugnant to the former averment; but where the objectionable words are not contradicted by any thing which goes before, but are really irreconcilable with some subsequent allegation, they cannot be thus rendered neutral. 1 Chitty Cr. Law, 238.

If the expression "current coin of this State," was even ambiguous, and capable of two meanings, this court is bound to take that meaning which would support the indictment, and not that which would defeat it; but a court is not at liberty arbitrarily to give a meaning to words inconsistent with the habits and understanding of mankind.

SEPT'R TERM,
1841.

The State
v.
Shoemaker.

The indictment charged the counterfeit coin to be in imitation, &c., of coin, &c., of "the State of Missouri," "called a Mexican dollar." Held: that the indictment was defective, as the words "State of Missouri," were contradictory and repugnant to the subsequent part of the description, and being descriptive of a material part of the offence, could not be rejected as surplusage.

SEPT. TERM,
1841.

The State
v.
Shoemaker.

If the coin had been described as current coin of Great Britain, or current coin of France or Mexico, but one meaning could have been applied to such expressions. And though, it is true, that with a previous knowledge that this State cannot, so long as our present form of government continues, coin money, a doubt might arise as to the meaning of "current coin of this State," yet that doubt is raised not by any ambiguity in the phrase itself, but from a knowledge that no such coin, taking the expression in its ordinary acceptance, can exist. This objection, taking it in any point of view, then, must be fatal; though it is much to be regretted that niceties should be allowed to impede the administration of justice.

The 7th sec. of the 4th art. of the act concerning crimes and punishments, (R. C. 1835, p. 184,) providing, that "every person who shall counterfeit any gold or silver coin, at the time current within this State by law or usage," means that the genuine coin must be current in this State, at the time the counterfeit is made. If the genuine coin should, after the counterfeit has been made, go out of circulation, the attempt to pass the counterfeit would still be an offence under the 21st sec. of said article.

As the defendant in error is held to bail under another indictment for the same offence, it is proper that an opinion should be expressed on the second objection stated in the motion in arrest. It is urged, that the words "*at the time current within this State by law and usage,*" are not laid with a venue, but refer to the time when the counterfeit coin was made, and not to the time when it was passed as true, or attempted to be passed as true. The seventh section of the 4th article, declares every person guilty of forgery in the second degree, who counterfeits any gold or silver coin, at the time current within the State, by law or usage. By this it is clearly to be understood that the genuine coin must be current in this State, at the time the counterfeit is made. The 21st section then declares every person guilty of the same offence, who passes as true, or attempts to pass as true, any counterfeit of any gold or silver coin, the counterfeiting of which is declared forgery in the 7th section. The time when the genuine coin must be in circulation, is then referred to the time when the counterfeit coin is made, and not to the time when it is passed, or attempted to be passed. If the genuine coin should, after the counterfeit coin has been made, go out of circulation, the attempt to pass the counterfeit would still be an offence under the 21st section. The indictment is good, therefore, in this respect; the time mentioned referring to the time when the counterfeit coin was made and not when it was passed.

Judgment affirmed.

JOHNSTON V. THE STATE.

SEPT'R TERM,
1841.

Under our statute, a felony is an offence for which a party, on conviction, *may* be imprisoned in the penitentiary, and not where, on conviction, he *must* be so imprisoned.

Johnston
v.
The State.

Appeal from the Circuit Court of Benton county.

Winston for Appellant.

1st. As the indictment against the defendant was for a felony, it was error to give a judgment against him for a misdemeanor.

2d. There was error in permitting evidence of two assaults to be given to the jury, when the defendant was only charged with one.

Opinion of the Court by Napton, Judge.

The appellant was indicted by the grand jury of Benton county, for a felonious assault. The indictment was framed under the 35th section of the second article of the act concerning crimes and punishments. The jury found the defendant guilty, and assessed as his punishment a fine of fifty dollars, and twenty-seven days imprisonment in the county jail.

It appears from the bill of exceptions, that the appellant had an altercation with one Hughes, and struck the said Hughes with a stick of timber, and a fight ensued between the said appellant and Hughes, during which several blows on the head were inflicted by Johnston with the stick aforesaid. After the parties were separated, it was further proved by the prosecutor, that Johnston immediately seized an axe, and attempted to strike Hughes, but was prevented. This last testimony was objected to by defendant. Motions for a new trial and in arrest of judgment were made, but overruled by the court.

The error assigned in this court is, that the indictment was for a felony, and the judgment against appellant was for a misdemeanor. This is a mistake originating, I suppose, Under our statute, a felony is an of-

SEPT'S TERM,
1841.

Johnston

v.
The State.

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Penitentiary,
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in a misunderstanding of the definition of the word felony by our statute. A felony under our act, is an offence for which the party *may* be imprisoned in the penitentiary. The legislature have wisely left it to the discretion of the jury, in many offences to inflict the punishment of imprisonment in the penitentiary, or fine and imprisonment in a county jail; and the offence charged in this indictment is one of them. Though this discretion is given to the juries, they are still felonies.

The circuit court committed no error in permitting the witnesses to describe the whole altercation between appellant and Hughes. The bill of exceptions shows clearly that when the combatants were separated, the appellant *immediately* raised an axe at Hughes. It was a continuous transaction, and as such, the whole of it properly went to the jury. Judgment affirmed.

MIDDLETON v. ATKINS, and others.

Petition in debt cannot be maintained where an averment is necessary to show the right of action: but if an averment is made where it is wholly unnecessary, it may be rejected as surplusage.

Error to the Platte Circuit Court.

Wood for Plaintiff.

1st. That the general statement of the petition, that the plaintiff is the legal owner of a note against the defendants, Joseph Atkins and John A. White, &c., includes an averment, that Joseph Atkins and John A. White made the note by the name and description of "Atkins & White."

2d. That if the averment in the petition was unnecessary, it can only be regarded as surplusage, and may be rejected.

3d. That the action by petition in debt may be maintained on any *note or bond for the direct payment of money, without any condition, collateral or alternative*, of which the plaintiff is legal owner.

4th. That this form of action may be maintained by or ^{SEPT'R. TERM,} against partners. Lee & Remington v. Hunt & Paddock, 1841.
 6 vol. Mo. Rep. 163; Curle v. McNutt, 6 vol. Mo. Rep. 495; Middleton
 Curle v. Pettis, 6 vol. Mo. Rep. 497; 4 Monroe, 526; John- v.
 ston v. Ellison; Rochester v. Trotter, 4 Bibb; Kinsman v. Atkins.
 Castleman & Co., 1 Monroe, 210.

Baldwin for Defendants.

The decision of the court below in sustaining the demurrer, was correct, and the petition, *in this case*, was defective, because of the averment contained therein, that the note was made and executed by Joseph Atkins and John A. White, under the name and style of Atkins & White.

The principle, that no averments are allowable in this form of action, is so well established by the decision of this and the court of Kentucky, upon the subject, that it is unnecessary to refer specially to them.

Opinion of the Court by Tompkins, Judge.

Middleton sued the defendants by petition in debt. The petition is in these words, viz: "Reuben Middleton, the plaintiff, states that he is the legal owner of a note against the defendants, Joseph Atkins, John A. White, Mark McCausland, and Mathew M. Hughes, to the following effect: One day after date, we promise to pay George W. Barnett & Co., sixteen hundred and seventy dollars and fifty-nine cents, with ten per cent. interest thereon from this date until paid. Value received. 26th March, 1841.

ATKINS & WHITE,
 MARK MCCAUSLAND,
 MATHEW M. HUGHES.

And the said plaintiff avers, that the said Joseph Atkins and John A. White, by the name and description of Atkins and White, made, executed, and delivered the said note, to wit, at the county of Platte aforesaid, on which is the following assignment: Pay to Reuben Middleton,

GEORGE W. BURNETT & Co.

SEPT'R TERM, 1841. By virtue of which the plaintiff has become the proprietor &c."

Middleton
v.
Atkins.

The defendants demurred to this petition, and judgment being given for them on the demurrer in the circuit court, the plaintiff brings up the cause on writ of error. The case of Wood and others v. Hunt and Paddock, shows that in the opinion of this court the averment made in this cause was useless. It was the unanimous opinion of the court that the statement in the petition, that the plaintiffs are the legal owners of the note or bond, includes the averment that the note set out was executed to the plaintiffs by the partnership name.

Petition in debt cannot be maintained where an averment is necessary to show the right of action: but if an averment is made where it is wholly unnecessary, it may be rejected as surplusage.

In two cases it was decided by this court that petition in debt cannot be maintained on any instrument of writing if an averment be necessary to show the right of action. These two cases are Curle v. McNutt, and Curle v. Pettis. Both cases are decided on the authority of the Kentucky courts. Our law being borrowed from Kentucky, we consider the decisions of the courts of that state as of the highest authority. The first case above mentioned was a suit on a note without a date, the second was a suit on a note for a sum of money for the hire of a negro, for clothing and returning the said negro on the expiration of the term. In the one case it became necessary to aver when the note was made, in the other, to aver that the clothing was not furnished, and the negro not returned, in case of neglect to do either; and it was the opinion of the Kentucky courts, that the holder of such a note as the last, could not sue on part of a contract viz: for the money alone; so he could not sue either on that note or the first mentioned note in the statutory action, in each it being necessary to make an averment.

The averment here made, it has been shown, is mere surplusage, that may be expunged without any injury to the rest of the matter in the petition, and therefore it does not vitiate it; it does not alter the character of the instrument sued on. It is the character of the instrument which determines the right of the plaintiff to use this form of action; and he cannot then lose this right, because he has negligently inserted this idle averment in the petition.

The judgment of the circuit court ought, in my opinion, to be reversed, for the reasons above given; and the other members of the court concurring in the opinion that the circuit court committed error in sustaining the demurrer, its judgment is reversed, and the cause will be remanded for further proceedings therein.

SEPT'R TERM,
1841.

Harvey
v.
Renfro.

HARVEY V. RENFRO.

The statute does not require that a "Petition in debt" should be signed by the plaintiff or his attorney: and if it did, the court might permit the plaintiff or his attorney to sign the petition at the return term, and such permission would be no ground for a continuance.

Appeal from the Circuit Court of Grundy county.

Ewing for Appellant.

1st. The circuit court erred, in refusing a continuance to defendant upon his motion therefor, after plaintiff's amendment. See Revised Statutes, p. 458, 3d art., 5th and 6th sections.

2d. That the party himself, or a licensed attorney *alone*, has a right to sign any pleading or proceeding. Rev. Statutes, page 458, secs. 5 and 6.

3d. The petition was no declaration at all until properly signed by the party or his attorney.

Slack for Appellee.

1st. That the petition in debt was in the first instance well and sufficiently signed.

2d. That the amendment was immaterial, and would not entitle the defendant to a continuance.

3d. That it is not required by the statute that a petition in debt should be signed by the plaintiff or his attorney.

SEPT. TERM,
1841.*Opinion of the Court by Scott, Judge.*Harvey
v.
Renfro.

John Renfro brought a petition in debt against Harvey. The petition was signed John Renfro, by William Renfro, agent, and at the return term of the writ, Renfro obtained leave of the court to have the petition signed by his attorney. Harvey then asked for a continuance, that he might have time till the next term to plead to the petition of Renfro. This motion was overruled, and a plea was filed, and the parties went to trial, and a verdict and judgment were obtained by Renfro. Harvey then appealed to this court, and complains of the refusal of the circuit court to grant him a continuance after allowing Renfro to amend his petition. The act for the speedy recovery of debts does not require that the petition in debt should be signed by the plaintiff or his attorney : and if it did, the court properly allowed the amendment. It was not an amendment of a character to produce any surprise to Harvey, and therefore the continuance was properly refused. Let the judgment be affirmed.

The statute does not require that a "petition in debt" should be signed by the plaintiff or his attorney. and if it did, the court might permit the plaintiff or his attorney to sign the petition at the return term, and such permission would be no ground for a continuance.

GRANT v. WINN and others.

In stating the date of a promissory note it must be truly stated, and if the note bears no date, it may be alleged to have been made at any day ; and in that case, the words "bearing date," or "dated," being descriptive words, must be omitted.

Appeal from the Clay Circuit Court.

Doniphan & Burnett for Appellants.

1st. That the court erred in permitting the article of agreement to be read in evidence.

2d. That the court erred in overruling the motion of Grant, to set aside the finding of the court sitting as a jury, and grant a new trial.

3d. That the agreement was variant from the one set out in the declaration. See 4 Starkie, 1598-9 ; 1589 1st Chitty's Pleadings.

SEPT'R TERM,
1841.

Grant
v.
Winn.

Wood for Appellee.

1st. That there is no material variance between the writing as declared on, and the writing as given in evidence, the substance of the allegation being that the appellant promised to pay on the 25th Dec. 1840. See Bell and Craig v. Scott, 3d vol. Mo. Rep. 212 ; Martin v. Miller, 3d vol. Mo. Reps. 135.

2d. That profert having been made, there ought to have been a demurrer, and too late on the trial.

3d. The whole record shows the finding and judgment to have been right, and this court will not disturb it.

4th. The bill of exceptions only shows that the appellant objected to the introduction of the agreement, and does not show exception saved ; objection and exception are not the same.

Opinion of the Court by Napton, Judge.

The appellee sued Grant in assumpsit, upon a promissory note for \$62 50. The declaration averred, that on the 25th day of August, 1840, at, &c., defendant made his certain agreement in writing, dated the day and year aforesaid, and thereby then and there promised to pay, &c. Upon the trial, the plaintiff offered in evidence a note, answering to the description of the declaration, except that it bore no date at all. The defendant below objected to the note, but the court allowed it to go to the jury. There was a verdict and judgment for plaintiff, motion for a new trial by defendant, and exceptions duly saved.

In stating the date of a promissory note, it must be truly stated ; and if the note bears no date, it may be alleged to have been made at any day ; and in that case, the words "bearing date," or "dated," being descriptive words, must be omitted. 1 Chitty's Plead., 255. It is the opinion of

In stating the date of a promissory note it must be truly stated, and if the note bears no

SEPT'R TERM, this court that it was error to allow this note to go to the jury.
1841.

Grant

Judgment reversed and cause remanded.

v.
Winn.

date, it may be alleged to have been made at any day ; and in that case, the words "bearing date," or "dated," being descriptive words, must be omitted.

HAWKINS V. THE STATE.

1. In prosecutions for felonies, the omission of the similiter will not vitiate the proceedings.
2. On the trial of an indictment against a white person, the State may give in evidence a conversation between the accused and a negro, in relation to the offence charged, when the conversation on the part of the negro is merely given in evidence as an inducement, and in illustration of what was said by the white person. But this conversation must be proved by a white person, and not by the negro.
3. It is well settled that confessions induced by the flattery of hope, or terror of punishment, are not admissible in evidence. But a mere observation to the accused, by the person who had her in custody, "that in the long run it would be better for her to tell the truth about the matter, and not any lies," was held not to bring within the above rule, a confession made by the accused afterwards, in a conversation with a third person.

Appeal from the Circuit Court of Jackson county.

Young, Circuit Attorney.

It is believed that the only question worthy of the consideration of this court, is whether the court erred in permitting the confessions of the appellant to go to the jury. To show that the court committed no error, see 2d Starkie's Evidence, page 2, and notes thereto ; Arch. Cr. Plea. page 116 & 117.

Opinion of the Court by Scott, Judge.

Rebecca Hawkins was indicted, tried and sentenced to imprisonment in the penitentiary for mingling poison with

the food and drink of her husband. From the judgment of the circuit court she appealed to this court, and now assigns for error, that there was no issue joined in the cause; and the admission of improper evidence on the trial

SEPT'R TERM.
1841.

Hawkins,
v.
The State.

In prosecutions for felonies, the omission of the *similiter* will not vitiate the proceedings. Chitty's Cr. Law, 482.

In prosecutions for felonies, the omission of the *similiter* will not vitiate the proceedings.

The question as to the legality of the evidence arises from the following facts: A witness stated that he was required by the sheriff to assist in arresting a negro woman, accused with others of poisoning Hawkins; that the said negro woman was arrested and taken to the house of Daniel King, where they found the plaintiff in error, who had been arrested at the burial of her husband, and taken to the house of the said King. When the witness and sheriff, with the negro woman, reached the house of King, the plaintiff in error thus accosted the negro woman: "Mary, do you say I know any thing about this matter?" Mary answered yes, we all know about it; I shall have to die, and I am not going to tell any more lies about it. The plaintiff in error denied all knowledge of the matter. The witness, sheriff, plaintiff in error, and negro woman, then went over to the house of the sheriff; while on their way thither, the plaintiff in error said she knew nothing about the poisoning of Hawkins. The witness stated that just before they reached the house of the sheriff, he said to the plaintiff in error, that it would be better in the long run to tell the truth about this matter, and not any lies, but did not give her any reason why it would be better to do so. The plaintiff in error made no answer to this. Some five, ten, or fifteen minutes after this, and when they were all at the sheriff's house, the plaintiff in error said to the negro woman, Mary, you have ruined us all: Mary replied, dont say I have, Mistress. The plaintiff in error then observed, well, we have ruined ourselves. The negro woman, continuing her conversation, remarked, Mis'tress, you know you sent Garster for the poison, and that you sent Ned to Garsters for it, and when it came, you told me to put some into a cup and bring it to you; I did so, and you poured some coffee in the cup on it; plaintiff in error said yes, but my heart failed me, and I did

SEPT'R TERM,
1841.

Hawkins
v
The State.

not then give it to him, but threw it out; but in consequence of some ill treatment during the succeeding night, she said the next morning she told Mary to put some more of that stuff in a cup, and bring it to her, and she would try and give it to him: that Mary brought the cup with the poison in a little coffee; she took the cup and poured more coffee into it, and gave it to Hawkins to drink at breakfast. Hawkins took the cup and drank its contents, and afterwards went out horse hunting, and returned home complaining that he had been sick. The poison used was rat-bane.

It is contended that the court erred in permitting what the negro said to be given in evidence. That negroes cannot testify against white persons is clear; but this rule cannot be carried so far as to exclude the conversation of a negro with a white person, when the conversation on the part of the negro is merely given in evidence as an inducement and in illustration of what was said by the white person. If the conversation of the negro had been proved by herself, then it would clearly have been illegal. Here the state proved by competent witnesses that certain remarks were made to the plaintiff in error in order to show what her reply was. It is a matter of indifference by whom they were made; all that was required was to prove by competent evidence that they were made. That they were made is a fact, which may be proved like any other fact in the case.

On the trial of an indictment against a white person, the State may give in evidence a conversation between the accused and a negro, in relation to the offence charged when the conversation on the part of the negro is merely given in evidence as an inducement, and in illustration of what was said by the white person. But this conversation must be proved by a white person, and not by the negro. It is well settled that confessions induced by the flattery of hope, or terror of punishment, are not admissible in evidence: But a mere observation to the accused, by

It is next objected, that the confession of the plaintiff was improperly admitted, because it was induced by a promise.

That confessions induced by the flattery of hope, or terror of punishment, are not admissible in evidence, is a principle well settled in our jurisprudence. *Hector v. State*, 2 vol. Mo. Rep. And it is the province of the court, and not of the jury, to determine whether they are made with that degree of freedom which will render them admissible in evidence. From the detail of the witness given above, it cannot be perceived, that the observation to the plaintiff in error, "that in the long run it would be better for her to tell the truth," had any influence on her. She seems to

have been laboring under the impression that the negro had betrayed her, and her language was dictated by a sense of disapprobation of her conduct. Laboring under the same impression, she afterwards commences an expostulation with the negro, and in the course of their altercation their guilt is disclosed; it is impossible to say that these disclosures were caused by any thing said by the witness.

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1841.

Hawkins

v.
The State.

the person
who had her
in custody,
"that in the
long run it
would be bet-

Judgment affirmed.

ter for her to tell the truth about the matter, and not any lies," was held not to bring within the above rule, a confession made by the accused afterwards, in a conversation with a third person.

EX PARTE OWEN.

Under the 2d sec. of the act making allowance for the transportation of convicts to the Penitentiary, approved 1st Feb., 1839, the guards are allowed, as full compensation for their services, one dollar and seventy-five cents per day, and eight cents per mile, and cannot claim the additional allowance of one dollar and fifty cents for every criminal. Quære, whether this court has jurisdiction in any district except that wherein the seat of government is situated, to hear and determine applications for a mandamus on the Auditor of Public Accounts?

Application for Mandamus to Auditor Public Accounts.

Opinion of the Court by Napton Judge.

The following facts are agreed between petitioner and the circuit attorney: "At the March term, 1841, three prisoners were convicted and sentenced to the State Penitentiary. James H. Owen, as Sheriff of Platte county, carried said convicts to the State Penitentiary, and L. C. Jack, Moseby N. Owen, John W. Vineyard and J. Staunton, were guards, who assisted him in transporting said convicts. An account was presented to the Auditor of Public Accounts, and a warrant on the State Treasurer demanded for services charged in said account; that all said account was allowed by the Auditor, except the 4th item, allowing \$1 50 per diem

Under the
2d sect. of
the act ma-
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ance for the
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victs to the
Penitentiary,
approved 1st
Feb. 1839, the

SEPT.'R TERM, 1841. for each of said four guards, amounting in the whole to \$108. The guards were allowed \$1 75 per day for their

Ex parte
Owen.

guards are allowed, as full compensation for their services, one dollar and seventy five cents per day and eight cents per mile, and cannot claim the additional allowance of one dollar and fifty cents for every criminal. Quære, whether this court has jurisdiction in any district except that wherein the seat of government is situated, to hear and determine applications for a mandamus on the Auditor of Public Accounts?

The whole account was presented to the circuit court of Platte county, and by the judge and circuit attorney certified to the auditor for his warrant. The petitioner asks a mandamus upon the Auditor, requiring him to audit and allow the said item of \$108 in said account. Waiving the question, whether this court would have jurisdiction in any district except that wherein the seat of government is situated, to hear and determine this and similar motions, the court are unanimously of opinion, that the construction given by the Auditor of Public Accounts, to the second section of the act of 1838-9, page 93, under which this account was presented, is correct.

Motion overruled.

PARKS and others v. THE STATE.

1. Nil debet is a bad plea to an action of debt on a bond with collateral conditions.
2. An omission on the part of the State to bring suit upon an official bond, upon the default of the officer to account, for several years after the default occurred, will not discharge the securities. Laches will not be imputed to the State.
3. The State is not included in, nor barred by, any act of limitation, unless expressly named therein.

Appeal from the Circuit Court of Ray county.

Rees for Defendants.

The defendants contend that the court erred in sustaining the demurrer to their plea as aforesaid. See 1 Story Equ. 321-2; the People v. Janson, 7 J. R. 332, and Pain v. Packford, 13 J. R. 174.

*Opinion of the Court by Scott, Judge.*SEPT'R TERM,
1841.Parks
v.
The State.

This was an action of debt on a collector's bond, in which judgment was obtained by the State against the appellants. The appellants, in February, 1836, became securities for William Mauzey, as collector of Ray county, and with him entered into bond to the State of Missouri, with the conditions prescribed by law. The declaration avers as a breach of the condition of the bond, that Mauzey, in February, 1837, and before and since that time received large sums of money, for which he failed to account. The appellants pleaded *nil debet, non est factum*, performance of the conditions of the bond, and a plea alleging in substance, that in the latter part of the year, 1836, Mauzey died intestate, and letters of administration were granted on his estate; that the administrators advertised in the public newspapers that letters of administration had been granted to them, with their date, and requiring all persons having claims against the estate, to exhibit them for allowance within one year after the date of the letters, or they might be precluded from any benefit of said estate; and that if such claims were not exhibited within three years from the date of said letters, they should be forever barred; and that three years had fully elapsed after the date of said letters before the commencement of this suit. It is further alleged that they had no notice of any default or other liability of the said Mauzey, as collector, until after the expiration of three years from the date of the said letters; by reason whereof they have been precluded from any benefit of the estate of the said Mauzey, in consequence of their liability as his securities.

To the first and last pleas the defendant in error demurred, and the demurrer was sustained. This is the error of which complaint is made.

Nil debet is a bad plea to an action of debt on a bond with collateral conditions. Chitty's Pleadings, 478.

As to the second plea, the counsel for the appellants have relied on the case of the People v. Janson, reported in 7th Johnson 332, in which it was held, that in an action brought against a surety on a bond given for the faithful discharge of

Nil debet is
a bad plea to
an action of
debt on a bond
with collate-
ral conditions.

SEPT^R TERM,
1841.

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the duties of a loan officer under a statute of New York, the surety might set up in his defence the laches of the supervisors in not discharging and prosecuting the loan officer for his first default, but suffering him to continue after repeated defaults, for more than ten years, when he became insolvent, and without prosecuting the officer as required by law; and when no notice was taken of the defaults of the principal until after the death of the surety, this laches of the supervisors was held to be a good defence, especially in a suit against the surety's heirs. In the case of the United States against Kirkpatrick, 9th Wheaton, 737, Justice Story says, the Supreme Court of the United States are not prepared to yield to the authority of the case of *The People v.*

An omission on the part of the State to bring suit upon an official bond, upon the default of the officer to account, for several years after the default occurred, will not discharge the securities. Laches will not be imputed to the State.

Jansen, and that laches not being in general imputable to the government, a mere omission to bring a suit upon the neglect of an officer or agent to account, where the laws require a periodical account and settlement, will not discharge his sureties. If laches cannot be imputed to the government, it will follow, that those who become securities for public officers must look after them. And the statute concerning securities has provided a mode in which they may be relieved from future liability when they are apprehensive of loss. The securities might have ascertained that Mauzey was in arrear, and paid the amount, and then they would have been substituted for the State, and been entitled to her priority in the administration of the assets: as it is, they cannot be barred, for their claim against the estate of Mauzey does not accrue until they have paid the demand of the

The State is not included in, nor barred by any act of limitation, unless expressly named therein.

State. No principle is better settled than that the State is never included in an act of limitation unless expressly named, and is not barred by it. *Nullum tempus occurrit reipublicæ*, is a maxim of our law.

Judgment affirmed.

RENNICK v. CHLOE, (a person of color.)

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1. The certificate of the presiding judge of a court of record in another State, that the attestation of the clerk of such court, is in due form, and by the proper officer, is conclusive evidence that the certificate contains all the facts, which, by the laws of that State, it should have certified.
2. In all the slaveholding States *color* raises the presumption of slavery, and, until the contrary is shown, a person of color is deemed to be a slave.
3. A statute of a slaveholding State, authorising persons to dispose of their property by will, will not be construed as conferring a power to emancipate slaves. The power to emancipate slaves, in another slaveholding State, must be shown to exist by the laws of that State, and if not so shown, the courts of this State will presume that no such power exists.

Appeal from the Lafayette Circuit Court.

Doniphan, Ryland, & Wood for Appellants.

1st. That there is no judgment on the demurrer of the defendant in error, to the special pleas in bar of the plaintiffs in error, and that the issue in law remaining undisposed of, arising on that demurrer, it was error in the circuit court to proceed to trial of the issue of fact on the third plea. Statutes State of Mo. page 462, sec. 1: 1st vol. Decisions of Sup. Court Mo. page 501, State of Missouri v. Gather and others. As to judgment on demurrer 360, 348, 293, Harris' Entries, 2d vol.

2d. It was error in the circuit court to admit as evidence the paper marked B. See page of record 27. The paper purports to be the will of Nicholas Wren, and is not competent as evidence, because,

First, No evidence was adduced that by the law of Kentucky a slave may be freed by will, and the proof as taken is not in conformity with the requisitions of the laws of this State. See 1st sec., page of the record 36.

Second, If by the laws of Kentucky slaves can be freed by will, the clerk's certificate is not full enough. It does not show the order of the court, nor does it show a proof of the facts required to establish a will. 1st section of the act of Kentucky, page of the record 36. See also 3 Marshall, 144.

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3d. It was error in the circuit court to admit as evidence the paper marked C. See page 31 of record.

4th. That the circuit court having permitted the defendant in error to give evidence as to what Isaac Wren had said about the freedom of Chloe, (see page of the record 60, dep. of Abm. Tuyman,) refused to permit the plaintiffs in error to introduce the same proof of Henry Rennick, (see page of the record 81,) and that this was error.

5th. That the defendant in error, to sustain her action for freedom, based on the said will of said Nicholas Wren, must be competent evidence to prove that by the laws of Kentucky a slave can be emancipated by will, and that there is no such proof in this case.

6th. That the defendant in error having been shown to have been a slave of Nicholas Wren, who is proved to have died in Kentucky, and as no law is proved to have been in force in that state which authorised the said Wren to emancipate the defendant in error by will, she is to be presumed still a slave.

7th. That in the absence of proof of what the law of the State of Kentucky is on the subject of emancipating slaves, the defendant in error to avail himself of the benefit of the law of this State, must show that the will of Nicholas Wren was proved as required by the law of this State, and that all the requisites of the law of this State, in relation to the probate and record of wills emancipating slaves, have been complied with, and that the defendant in error has failed to to show this. See Statutes of Mo., page 587, sec. 1 and 6 inclusive.

8th. That the defendant in error was not emancipated by the will of itself, but by the provisions of the will was not to be freed, by the executors on the happening of certain contingencies and events, and that the executors having failed to emancipate the defendant in error, as required by the will, her remedy for freedom is in chancery, and not at law. See 3 Little, 239, *Peters v. Cooke*.

9th. That the circuit court erred in overruling the motion of the plaintiffs in error for a new trial. Ky. Digest, 608; 4 Mo. Rep. 450, *Leap v. Eliot*.

French, Burden, & Young for Appellees.

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That the circuit court committed no error in refusing to grant a new trial.

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1st. That the record shows that the issue upon the first and second pleas were found by the court, and judgment thereon given, and rightly given for the defendant in error. 2 Harris' Entries, page 348; 5 Little's Rep. page 118, Cochran's executors v. Davis.

2d. The court committed no error in allowing the papers marked B. and C. to be read by the defendants in error to the jury as evidence. 1 Starkie Ev., page 193; Statute of U. States, cited in 1st Starkie Ev., page 190, note 1st; 1 Starkie Ev., page 212; Statute of U. States of 1804, cited on same page, note 2d.

3d. The court committed no error in giving the instructions asked by the defendant in error. See same authorities cited to the first point, and Hail v. Palmer and wife, 2d semi-an. part, 5th vol. Mo. Rep., page 403.

4th. The court committed no error in refusing to give the instructions asked by the plaintiffs in error. Ralph (a man of color) v. Duncan, 3 vol. Mo. Rep. page 194.

5th. There is no error in the instructions given by the court, at least if there is, the error is against the defendant in error.

6th. The circuit court committed no error in sustaining the demurrer to the special pleas of said plaintiffs in error. 1 Chitty's Plead., page 455; Revised Statutes of Mo. 1835, page 286, section 11.

7th. The circuit court committed no error in refusing to let the witness, Henry Rennick, relate the conversation he had with John Wren, the executor of Nicholas Wren, dec.

Opinion of the Court by Napton, Judge

The appellee instituted a suit in the Lafayette circuit court to recover her freedom. The declaration was in the usual form, and two special pleas, and the plea of not guilty were filed by the defendants below. The special pleas were

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demurred to, and issue taken on the plea of not guilty. The demurrers were sustained by the court, a trial had upon the general plea of not guilty, and the plaintiff had a verdict and judgment.

The testimony is preserved by a bill of exceptions. It appeared that the plaintiff was a slave of one Nicholas Wren, of Warren county, Ken., who died sometime in the year 1809, at an advanced age, having made his last will and testament. The will contained the following clause :

"It is my will, that in case Elizabeth, my wife, should die before the year 1820, Chloe, the negro girl, should be set free at the date of 1820. And it is my will that she serve out her time with one of my executors, (viz. my son Isaac Wren,) in case I should decease before that time. And if the said negro girl, Chloe, should have any increase previous to the said year 1820, it is my will that my said son Isaac Wren, should raise the children until they arrive to the age of twenty-one years, and then set them free also."

It appeared that Elizabeth Wren died in 1819, and that before the year 1820, the appellee, Chloe, had three children. John Wren, one of the sons and executors of his father's will, qualified and acted as executor ; but Isaac Wren, who lived in a remote county, did not act. Isaac Wren, however, it was proved, permitted the woman Chloe and her three children to be taken by William Rennick, one of the appellants, to Missouri, and a bill of sale was given by Isaac Wren, conveying his interest in Chloe's children until they arrived at the age of twenty-one years. It appeared, moreover, from the testimony of Isaac Wren and others, that William Rennick, one of the appellants, was fully apprised that Chloe was a free woman, and that her children were to be free at the age of twenty-one. His acknowledgments to this effect both before he left Kentucky and during his residence in this state, were given in evidence.

The copy of the will given in evidence was proved in accordance with the provisions of the act of Congress of March 27th, 1804. The certificate of probate was as follows :

"Warren County, sct. January County Court, 1810. This last will and testament of Nicholas Wren, deceased, was

proven by the oath of John Whitesides and David Barbree, two subscribing witnesses thereto, and ordered to be recorded. Attest, Jonathan Hobson, Clerk, W. C. C." Then follows the certificate of the clerk, that the above is a full and perfect transcript of the record of the original certificate of the probate, as it remained in his office. The other necessary certificates accompanied this, to which no objection was raised. A sworn copy of the will was also affixed and given in evidence.

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The statute of Kentucky, entitled an act to reduce into one the several acts respecting wills, the distribution of intestate's estate, &c." was also given in evidence. By that act it is in substance provided, among other things, that every person over the age of eighteen, being of sound mind, and not a married woman, shall have power by last will and testament in writing, to dispose of his chattels, provided such last will shall be signed by the testator, or by some other person in his presence and by his directions, and if not wholly written by himself, be attested by two or more competent witnesses subscribing their names in his presence. It is further provided by the 36th section of the same act, that "all certificates of probate or of administration attested by the clerk, shall enable the executor or administrator to act, and may be produced or given in evidence in any court within the commonwealth, &c."

The depositions of several witnesses were read in this case, conducing to prove the identity of the negro woman, the admissions of the appellants, and the fact that the appellee was still held in slavery.

The court instructed the jury that if they were satisfied that Nicholas Wren owned Chloe as his slave, and that he made his last will, as it was given in evidence, and that Chloe is the same woman mentioned in said will, and that Elizabeth Wren, the wife of the said Nicholas died before the year 1820, and that the said Nicholas Wren was over the age of twenty-one years when he made his said will, and that defendants or either of them at or before the commencement of this suit held the woman in slavery, they must find for the plaintiff. The court refused to instruct the

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jury, at the instance of the defendants, that there was no evidence given which showed, that by the laws of Kentucky, Nicholas Wren had any power to liberate his slaves by will, and that therefore the jury must find for the defendants. The court was also asked to say, that there was no evidence that the executor who qualified under the will, had ever set the plaintiff free; but the court refused to give this instruction, but instructed the jury that under the will, no act of the executors, or either of them, was necessary to set the plaintiff free, but that she became a free woman whenever the contingencies mentioned in the will happened. Many other instructions are found upon the record, but they seem to have no bearing upon the points involved in this case.

The material points arising on the record are,

1. Was the proof of the will and the probate thereof competent?
2. Were the instructions given by the court correct?
3. The admissibility and sufficiency of the admission of the defendant to establish the freedom of the plaintiff.

First. No objections have been taken to the proof of the will, under the act of Congress of March 27, 1804, except so far as it relates to the sufficiency of the certificates of probate. That certificate is supposed to be insufficient, because it does not show the order of the court, and does not contain a proof of the facts requisite to establish a will, under the first section of the act of the General Assembly of Kentucky, heretofore recited. The certificate of the clerk states that the two subscribing witnesses (naming them) proved the will, and that the same was ordered to be recorded. This certificate forms a part of the copy of the record certified by the clerk to be a full and perfect transcript of the record of the original certificate of the probate as it remained in his office. The 36th section of the act of Kentucky provides that all certificates of probate, attested by the clerk, may be produced or given in evidence in any court within that State. The form of the certificate, and the facts necessary to be certified, are not pointed out by that statute. But the justice, whose certificate follows that of the clerk, certifies that the attestation of the clerk is in due form and

by the proper officer. The clerk then certifies to the judicial character of the presiding officer.

The certificate of the presiding justice is conclusive evidence that the certificate of the clerk is in due form, and contains all the facts which, by the laws of that State, it should have certified. Nor can this court go behind the certificate of the clerk, and presume that any other or further order appears on the record of the county court of Warren county, than what appears on the transcript certified by the clerk, and which transcript he certifies to be a full and perfect transcript. All the requisites of the act of Congress seem to have been fully complied with; and the copy of the will, and the probate thereof, was competent testimony.

Second. The instructions of the court assume the ground that the act of the General Assembly of Kentucky, authorising a man to dispose of his chattels by will, authorises him to emancipate his slaves, unless some statute prohibiting the same is shown.

They are predicated on the hypothesis, that a general power to dispose of chattels by will, includes a power to bequeath liberty to a slave; that species of property being regarded as personal property in most, if not all, of the slave holding states; and that the courts of this state will not presume any restrictions upon this power, unless they be shown.

Whether slaves are to be regarded as chattels or real estate, is a question which in my opinion is calculated to throw no light upon this subject. They are in truth a species of property *sui generis*, to be held, disposed of, and regulated according to the laws of each particular state where slavery exists. In all slaveholding states *color* raises the presumption of slavery, and until the contrary is shown, a man or woman of color is deemed to be a slave. I speak, of course, of the slaveholding states of this Union, and in reference to the judicial determinations of the courts of those states, including our own.

It is judicially known to the courts of this state, that certain states of this Union recognise in their respective constitutions the existence of slavery within their limits. The

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The certificate of the presiding judge of a court of record, in another state, that the attestation of the clerk of such court, is in due form, and by the proper officer, is conclusive evidence that the certificate contains all the facts, which by the laws of that state it should have certified.

In all the slaveholding states, *color* raises the presumption of slavery, and, until the contrary is shown a person of color is deemed to be a slave.

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general policy of such states, in relation to this subject, is a matter of history. Is it consistent with this policy, and the safety of the State, that in states where slavery is tolerated, embracing a class of people of a different race and different color from the citizens of those states, every slaveholder should be at liberty upon his own mere emotion to emancipate his slaves, without the assent of the people of that state, expressed through legislative enactments? No such power could be presumed by a court, consistent with the character of our political institutions.

Nor do I think any such power could be fairly inferred from an act authorising individuals to *dispose* of their chattels, admitting slaves to be chattels, and they are so regarded for many purposes. A power to dispose of chattels could not fairly be construed into a power to confer an important political right upon a slave. That power could only be exercised by the consent of the sovereignty. The master of the slave is not the only person concerned in such a privilege as this; the whole community are alike interested. If the legislature authorised a citizen to dispose of all his lands and tenements, it would hardly be contended that such an act would authorise a man to burn down his house situated in the midst of a large city, to the great damage and perhaps destruction of his neighbor's property. No more could a power to dispose of slaves be deemed a power to annihilate slavery, by converting slaves into freemen.

A statute of a slaveholding state, authorising persons to dispose of their property by will, will not be construed as conferring a power to emancipate slaves. The power to emancipate slaves, in another slaveholding state, must be shown to exist by the

The act of the Kentucky legislature, authorising persons of a certain age to dispose of their chattels, did not therefore, in my opinion, authorise them to emancipate their slaves, and the appellee having produced on the trial no such law, the court should have instructed the jury to find for the defendants.

Third. In relation to the admissions of the defendants, the court is of opinion that such admissions, of themselves, are insufficient to authorise a verdict for the plaintiff. When a suitable foundation is laid for such testimony, the admission of a person holding another in slavery that he or she is free, is undoubtedly for many purposes legitimate evidence. They cannot of themselves prove the fact of freedom. If

this were so, the consequences are most apparent. It would only be necessary for the owner of slaves, however old and decrepit and worthless, to declare that his slaves were free, and *ipso facto*, they become free, and could upon these declarations or admissions obtain their freedom by a suit. This would clearly evade all legislative enactments, and conflict with the policy and indeed safety of all slaveholding states.

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laws of that
state, and if
not so shown,
the courts of
this state will
presume that
no such pow-
er exists.

But if the law of a state allows a master to emancipate his slave, and such emancipation is effected either by will or deed, in conformity with the law, the admission of the master, or others holding the petitioners in bondage, would be evidence proper to go to a jury, to show a compliance on the part of the slave with any condition which the will or deed may have imposed. In the present case, if the plaintiff had shown that by the laws of Kentucky, a master could set his slave free by will, the admissions of the defendants could have gone to the jury to show a compliance with the will by the executor, supposing that by the terms of the will of Nicholas Wren, any act was necessary to be done by his executor, or by the plaintiff, before the plaintiff would have been by the will entitled to her freedom. The admissions of the executor, or of the defendants, would undoubtedly be good evidence to show a performance of such conditions precedent.

Judgment reversed and cause remanded.

Tompkins, Judge.

In my opinion the judgment of the circuit court ought to have been affirmed.

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RUBY v. THE STATE.

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1. In a change of venue in a criminal cause, the original indictment should be retained in the office of the clerk, in the county in which it is found. A copy only should be included in the transcript of the record and proceedings.
2. In an indictment framed under the 31th sect. of 2d art. of the act concerning crimes and punishments, the assault was described as being made with a knife, and the wound inflicted was termed a *stab*. Held, that the word *stab* was not used as a technical term, but must be construed in its ordinary acceptation.

Appeal from the Circuit Court of Clay County.

Doniphan and Burnett for Defendant.

1st. That the court erred in overruling the motion in arrest of judgment.

2d. The court erred in overruling the motion for a new trial.

3d. The court gave erroneous instructions.

Opinion of the Court by Napton, Judge.

James Ruby was indicted by the grand jury of Jackson county for a felonious assault. The indictment contained two counts; the first framed upon the 31st section of the 2d art. of the act concerning crimes and punishments; and the second upon the 34th section of the same article. The jury found the defendant guilty on the second count. That count charged, that defendant on, &c., at, &c., with a knife, which said knife was then and there a deadly weapon, likely to produce death and great bodily harm, and which said knife he the said Ruby in his right hand then and there had and held, in and upon one James Davenport in the peace of the State, then and there being, did feloniously make an assault, and him the said James Davenport did then and there feloniously stab, with intent then and there feloniously to commit manslaughter, by then and there feloniously killing the said James, contrary to the form, &c.

The defendant moved to set aside the verdict, because the trial had not been had upon the original indictment, but up-

on the record sent up from Jackson county, on a change of venue. A motion in arrest was also made, on the ground that the indictment was informal and defective. Both motions were overruled, and judgment was pronounced against Ruby in conformity with the verdict. An appeal was taken to this court.

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The 26th section of the 5th article of the act regulating practice, and proceedings in criminal cases, provides, that where an order is made for the removal of a cause, the clerk of the court in which the cause is pending, shall make a full transcript of the record and proceedings in the cause, and transmit the same, duly certified, under the seal of the court, to the clerk of the court to which the removal is ordered. The 28th section provides, that when such transcript thus transmitted shall not be received, or lost or destroyed, the cause shall not, by reason thereof, be discontinued, but another transcript may be transmitted and filed, and proceedings thereon had as though no such loss or failure had happened. It is obvious that it is contemplated by this last section, that the original indictment is to be retained in the office of the county where it is found, otherwise a record transcript could not be made out as is directed by this act.

It is supposed, however, that a defendant may perchance, by the negligence, inaccuracies, or willful mistakes of a clerk, be prevented in this way from taking advantage of defects in the original indictment. This court would not, I apprehend, proceed upon any presumption that clerks would make mistakes in copying indictments any more than in making up any other record. The defendant is by our law entitled to a copy of the indictment found by the grand jury, and if any reasonable doubts could be made to appear that the copy furnished him was not a true copy, the court would not hesitate, by some suitable writ, to have the original produced. If he goes to trial on the record, certified and transmitted by the clerk, he cannot, after verdict, be permitted to raise objections, which, if they have any foundation in truth, are the result of his own laches.

The indictment upon which the appellant was convicted,

In a change of venue in a criminal cause, the original indictment should be retained in the office of the clerk, in the county in which it is found. A copy only should be included in the transcript of the record & proceedings.

WEEK'S TERM, 1841. is framed upon the 34th section of the 2d art. of the act concerning crimes and punishments. The charge is in substance, an assault with an intent to commit manslaughter.

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That assault is described as being made with a knife, and the wound inflicted is termed in the count a stab. The precedents framed under the British statutes of James, for stabbing and cutting, are conceived to be entirely inapplicable to this indictment. The word *stabbed* here is not used as a technical word, but it is to be construed in its ordinary acceptance. The witnesses, in speaking of the wound inflicted, describe it as being done with a knife, and give its length, breadth, and depth. The allegation of stabbing was sufficiently made out in this case.

In an indictment framed under the 34th sect. of the 2d art. of the act concerning crimes & punishments, the assault was described as being made with a knife, and the wound inflicted was termed a *stab*. Held, that the word *stab* was not used as a technical term, but must be construed in its ordinary acceptance.

Judgment affirmed.

Held, that the word *stab* was not used as a technical term, but must be construed in its ordinary acceptance.

DECISIONS
OF THE
SUPREME COURT OF MISSOURI.
THIRD JUDICIAL DISTRICT,

SEPTEMBER TERM, 1841.

**SHELTON v. FORD & WHITEHILL, impleaded with G. W.
CALL.**

1. In a suit against securities, on a bond, the principal debtor is not a competent witness for the securities, even though he has received from them a bond of indemnity against the costs of the suit. The principal is interested in the event of the suit, under the statute concerning securities. (R. C. 1835, title, "Securities," sect. 4 p. 574.)
2. It will not avail a party merely to *object* to the decision of the court. He must *except* also, and the exception must appear upon the record.

Error to St. Louis Circuit Court.

C. D. Drake for Plaintiff.

The court below erred in admitting the deposition of Call to be read; and, also, after it was admitted, in refusing to exclude so much of it as related to a note, stated by Call to have been negotiated by him to A. M. Rucker, and by Rucker transferred to the plaintiff. *Hubby v. Brown & Nichols*, 16 Johnson's Rep. p. 70; *Hartford Bank v. Barry*, 17 Mass. R. p. 94; *Mann v. Swan*, 14 Johnson's R. p. 269; *Manning*

SEPT'R TERM, 1841. v. Wheatland, 10 Mass. R. p. 502; 3 Pickering's R. p. 184; Bank U. S. v. Dunn, 6 Peters' R. p. 51; Bank of the Me-

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tropolis v. Jones, 8 Peters' R. p. 12.
Again: the circuit court ought to have excluded so much of Call's deposition as referred to a note, as the suit was upon a bond, and the testimony consequently inapplicable.

Gamble & Geyer for Defendants.

1st. G. W. Call, who is admitted by the pleadings, and proved in evidence to have been the principal in the note, was, under the circumstance of this case, a competent witness in an action against his sureties.

2. Whether the witness, by the use of the term "note" in his deposition, intended to mean the instrument sued on, was a question of fact for the jury, and was therefore properly left to them by the court. Chitty on Bills 654, and notes; Starkie's Ev. part iv. p. 297, and notes; see also, 2 East's Rep. p. 458, Burt v. Kershaw; Ilderton v. Atkinson, 7 T. R. p. 481.

Opinion of the Court by Tompkins, Judge.

Shelton filed in the circuit court of St. Louis county against said John Ford, John Whitehill, and George W. Call, his petition in debt, founded on a bond made by said Ford, Whitehill and Call, to one Rucker, and by Rucker assigned to John G. Shelton, the plaintiff in this action. Judgment was given in the circuit court for Ford and Whitehill. George W. Call not being summoned in the cause.

On the trial of the cause in the circuit court the defend-

In a suit against securities, on a bond, the principal debtor is not a competent witness for these securities, even though he has received from them a bond of in-
ants, Ford and Whitehill, introduced a deposition of said Call, which they offered to read in evidence. The plaintiff, Shelton, objected to the reading of this deposition, because it had been shown that Call was principal in the bond, and the defendants, Ford and Whitehill were his securities. This objection being made, a bond was filed "to indemnify and save harmless, said Call from and on account of all costs that have accrued or may accrue," in the action. The circuit

court then overruled the objection to the incompetency of ^{SEPT'R TERM,} Call, and permitted the deposition to be read. Call, in his ^{1841.} deposition, called the instrument of writing here sued on a ^{Shelton v.} note, it being a bond without a condition, and the plaintiff ^{Ford and} then moved the court to exclude from the consideration of ^{Whitehill.} the jury all that part of the deposition that relates to a note ^{indemnity} stated to have been executed by the deponent and defend- ^{against the} ants, as not applying to the bond sued upon. The court re- ^{costs of the} fused to give the instruction, and the plaintiff excepted to ^{suit. The} the opinion of the court in that matter. The act concerning ^{principal is} securities, provides that "where any bond, &c., shall not be ^{interested in} paid by the principal debtor according to the tenor thereof, ^{the event of} and such bond, or any part thereof, shall be paid by any se- ^{the suit, un-} curity therein, the principal debtor shall refund to such secu- ^{der the stat-} rity the amount or value so paid, with interest thereon, at ^{ute concern-} ten per centum per year from the time of such payment." ^{ing securities.} The rate of interest established by our statute is six per ^{(R. C. 1835,} cent. Call, then, is directly interested in the event of this ^{title "securi-} suit; for, if judgment had been given against the defend- ^{ties," sect. 4,} ants, he would have been liable to pay the excess of ten, ^{p. 574.)} over six per cent. per year on all money his security might have been compelled under such judgment to pay. He then was a witness, with such an interest as rendered him incompetent; but the plaintiff, Shelton, did not except to the decision of the court. He objected to the admission of the deposition in evidence. It is not sufficient to say that he objects: he must save his objection on the record by excepting to the opinion of the court in overruling his objection. After the bond of indemnity had been filed, the circuit court thought the objection to Call's competency was removed; and for any thing appearing on the record, the defendants might well have supposed the plaintiff too was satisfied, and they thereby might have been induced to omit to introduce other evidence to establish the facts testified to by Call.

It is very true that this bond, filed long after Call's deposition was taken, could not reach back to remove the prejudice with which his interest in the event of the suit might have affected his mind, (for such is the opinion of this court.)

It will not avail a party merely to object to the decision of the court. He must except also, and the exception must appear upon the record.

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Whitehill.

but the circuit court thought otherwise, and the defendants were surprised by the failure of the plaintiff to except to the decision of the court. Prudence requires that the party dissatisfied with the decision of a court of record, should except to such decision, and not content himself with saying that his objection was overruled by the court.

The plaintiff saved his exception to the decision of the circuit court on his motion to exclude from the consideration of the jury so much of that deposition as relates to a note, stated to have been executed by the deponent and defendants, as not applying to the bond sued upon. But the objection appears to be rather technical and captious than solid. It is true that in the language of lawyers, a note and a bond are very different instruments. But in popular language they are so often confounded, that lawyers themselves frequently, to make themselves understood, call a single bill obligatory, by the popular name of a note under seal. At all events, the plaintiff having had notice of the taking of this deposition, might have attended, and cross-examined Call, and thereby have made it appear by positive testimony, whether this note of which he speaks, and the bond sued on, were the same instruments of writing; he having neglected to do so, the identity seems fairly to be left to the jury.

In my opinion the circuit court committed no error in its decision on this last point; and the plaintiff having failed to except to the decision of that court in allowing the deposition to be read, and the defendants being thereby induced to rely on the evidence contained in the deposition, its judgment ought to be affirmed; and such being the opinion of the court, it is affirmed.

STEAMBOAT THAMES V. ERSKINE & GORE.

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1. To entitle a party to the benefit of objections to any proceeding in the circuit court, it should appear upon the record that the same objections were made in that court.
2. It is not necessary that the certificate of a clerk of a court should state that the court was a court of record. The seal of the court annexed to the certificate, raises the presumption that it is a court of record, and it lies upon the party objecting to rebut that presumption.

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Appeal from the Circuit Court of St. Louis county.

King & Tunstall for Appellant.

1st. The court erred in suffering improper evidence to be given to the jury, on the part of the appellees.

2d. In overruling appellant's motion for a new trial for reasons filed. Mo. Digest, p. 220, sections 6 and 7; Mo. Digest, p. 220 & 221; McLean administrator of Brockman, v. Thorp, 4th vol. Mo. Decisions, p. 257; Mo. Digest, p. 221, sections 13 & 15; Mo. Digest, p. 221, sections 16 and 17.

Polk for Appellee.

1st. That the court below committed no error in allowing the deposition of Josiah G. Sanborn, on the part of the plaintiffs, to be read in evidence to the jury.

2d. That the court below did right to overrule the motion for a new trial. Campbell & Maison v. Hood, 6 vol. Mo. Reps. p. 217; Code of 1835, p. 221, sec. 17.

Opinion of the Court by Tompkins, Judge.

Greene Erskine and Stephen Gore brought their action against the Steamboat Thames; the judgment of that court being rendered in their favor, the defendant appeals to this court to reverse that judgment.

On the trial of the cause the plaintiffs offered in evidence a deposition to prove the delivery of a trunk at Pittsburg, in Pennsylvania, to the steamboat Thames, to be delivered

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This trunk and its contents are the object of the suit. The defendant objected to the reading of the deposition as evidence in the cause; the court overruled the objection, and the defendant took exceptions to this decision.

On the part of the plaintiffs it was testified, that shortly after the arrival of the Thames at St. Louis, the trunk was demanded at the boat by a clerk of the plaintiffs, whose peculiar duty it was to attend to such matters; this witness stated that he and the clerk of the steamboat Thames searched for it on other boats than the Thames, and that it could be no where found. This witness, on cross-examination, stated that he did not know when the steamboat landed at St. Louis, but that he first sent for the trunk, and on failure to get it, went for it himself: that all this was done soon after the bill of lading was found on the desk of the plaintiffs; and it being his particular duty to attend to such business, he did not think the bill of lading could have lain long on the desk before it was observed by him.

Another witness on the part of the plaintiffs, (the same stated by the first witness to have been sent for this trunk,) testified to the same facts as the first witness did.

On the part of the defendant, the deposition of the clerk of the steamboat was read in evidence. In this deposition the clerk states that the trunk was delivered on the bank of the river at St. Louis, in good order, and that he saw it lie there four hours: that as soon as the steamboat arrived at St. Louis, he delivered the bill of lading to one Martin, clerk of the house of Finney, Lee & co., to which the boat was consigned, in order that it might be delivered over to Erskine and Gore. On this testimony the jury having found a verdict for the plaintiffs, the defendant moved for a new trial, which being overruled, the defendant took exceptions to the decision of the court.

It is assigned for error that the court erred,

1st. In permitting improper evidence to be given to the jury on behalf of the appellees.

2d. In overruling the appellant's motion for a new trial.

The objections to reading the deposition, as set out in the

counsel's brief written and handed to the court after the argument of the cause, are, SEPT'R TERM,
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1st. That notice to take this deposition was not served on the attorney of record, as required by 6th and 7th sections of the act concerning depositions. Steamboat
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2d. Because the commission issued to take this deposition is not in pursuance of the law; and the case of McLean, administrator of Brockman, v. Thorp, 4th vol. of Missouri Decisions, is referred to in support of the reason.

3d. Because the deposition is not properly certified by the officer taking it, and authenticated by a clerk of a court of record.

The 31st section of the act to regulate the practice in the supreme court, in appeals and writs of error in civil cases, provides, that no exception shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as have been expressly decided by such court. The object of this provision is so evident that it can hardly be necessary to say that the legislature intended by it that a party taking the exceptions shall not take his opponent by surprise. In order to carry into effect the provisions of the To entitle
a party to the
benefit of ob-
jections to
any proceed-
ings in the
circuit court,
it should ap-
pear upon the
record that
the same ob-
jections were
made in that
court.

31st section of the act, the counsel of the defendant should perhaps have been required in the circuit court to assign in his bill of exceptions his reasons for objecting to the reading this deposition in evidence. Several points might have been made in this objection: three indeed are made as above noted. The rules of this court require that counsel shall present before the argument of each case a brief containing a statement of the facts of the cause and the points relied on, &c. This rule was dispensed with in this cause for the convenience of the counsel of the defendant in the circuit court, appellant here; and in the argument of the cause in this court, the only reason urged why the deposition should not be read, was that it did not appear from the certificate of the clerk that he was the clerk of a court of record, as required by the 16th and 17th sections of the act concerning depositions.

As to the first objection, to reading the deposition, although in my opinion it is improperly urged here, it may be

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observed that the sheriff's return is, that the notice was served by the sheriff in St. Louis county, on the 19th day of July, 1839, by putting up a copy thereof in the office of the clerk of the circuit court, neither the steam boat Thames nor any attorney of record being found. The pleas of the defendant first filed, and now regularly before this court, show the defendants counsel for the first time in the circuit court on the 10th day of December 1839, nearly five months after the serving of the notice to take depositions.

2d objection. To this it may be answered that the counsel for the appellant is mistaken in the law. The case of McLean adm'r of Brockman v. Thorp, decided in 1836, does not aid him. The opinion then delivered refers to the 323d page of the digest of 1825, where the law under which that decision was made, is found, and in the opinion the law is recited literally. It is not unreasonable to suppose that the deposition in that case was taken several years previous to the decision in the supreme court above cited; for in 1833 we find the same case remanded to the circuit court. The dedimus in this cause pursues the law of 1835, the law in force when it was issued.

3d objection. This goes to the sufficiency of the certificate. Ought it to appear from the certificate of the clerk that he was the clerk of a court of record? It is certain that this certificate is evidence of nothing except what the statute makes it evidence of; therefore if the clerk had certified that he was the clerk of a court of record, such certificate would not have been evidence of the truth of the fact. And if the seal of the court, and the act of the clerk be not evidence that he is the clerk of a court of record, then we are unable to prove that this clerk is the clerk of a court of record, but by either producing in court a copy of the law declaring it so, attested by the seal of the state government, or the statute book of the state printed under its authority. By the 16th section of the act concerning depositions, it was provided that the official character of any judicial officer taking depositions without this State, might be proved by a certificate of such official character, attested by the seal of state of the government in which the deposi-

It is not necessary that the certificate of a clerk of a court should state that the court was a court of record. The seal of the court annexed to the certificate, raises the presumption that it is a court of record, and it lies upon the party objecting to rebut that presumption.

tions were taken. If, then, the certificate of a clerk and his seal annexed, does not prove him to be the clerk of a court of record, the legislature have passed the 17th section of the act, giving effect to such certificates of courts of record, to very little purpose. Racon, at title, courts, letter D, 2, observes, that every court by having power given it to fine and imprison, is thereby made a court of record. Our act to establish courts of record, declares that each of those courts shall procure and keep a seal, &c. The courts not of record are not required to have seals. For the convenience of society, it has become so necessary to give to the copies of the records of a court the same authenticity which the record itself has, that I believe a seal is, in these states, regarded as a necessary incident of a court of record; and also, that every court having a seal and clerk, is regarded as a court of record. Such seems to be the understanding of our own legislatures. It is not to the highest officer of the sister state or to his secretary, that credit is given, but to the seal which is in the custody of such officer, and of which he is the keeper; it is not to the clerk of a court of record, (for if the credit were given to him his signature would suffice,) but it is to the seal of the court affixed by such clerk, that credit is given. To counterfeit a seal of a court is a work of more difficulty than to counterfeit the handwriting of the keeper of that seal. I am of opinion that when a court has a seal and a clerk, the presumption of its being a court of record is so strong, that the party who would rebut that presumption in this State, ought to produce the law of the State where the court exists, to show that such court is not a court of record.

I will notice another objection urged by the appellant in his brief, not mentioned, I believe, in his argument in court, and in my opinion not covered by his exception to the deposition. It is that it does not appear that the witness was sworn or affirmed to testify the whole truth, &c. In this the appellant's counsel is mistaken; the language of the certificate of the officer is this, the witness "was by me affirmed to testify the whole truth," &c.

But lastly, the counsel of the appellant thinks that the

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evidence of his client *greatly preponderated* in his behalf.

The evidence that would induce the circuit court to grant a new trial, ought to appear to that court much more weighty than that on which the verdict was found; for great deference is due to the judgment of the legitimate triers of matters of fact. And if much deference is due from the circuit court to the jury whose peculiar province it is to weigh the credit of witnesses, still much more is due from this court to the united judgment of the circuit court and of the jury. The weight of the evidence appears to me to be so nicely balanced, or rather to be so far from inclining in favor of the appellant, that the circuit court might, with propriety, have refused him a new trial on a much stronger state of facts. The clerk of the steamboat Thames, in his deposition taken by the appellant, states that he delivered the boat's bill of lading as soon as it had arrived, to Thomas G. Martin, clerk of the house of Finney, Lee & co., agents for the said boat, in order that he might advise the plaintiffs of the arrival of the said trunk, and collect the freight and charges on the same. Now this same Thomas G. Martin had been examined before the reading of this deposition of the clerk; and he had been also cross-examined, by the counsel of the appellant; and he neglected to ask this witness at what time of the day he delivered this bill of lading to Erskine and Gore. Had that time been proved, it might have afforded the jury better means of determining whether Erskine & Gore, or the steamboat, had been negligent. We are then left to conclude, that the appellant did not believe he could gain any thing by a more particular examination of the said Thomas G. Martin. In my opinion the circuit court committed error neither in permitting the deposition offered by the appellees, to be read in evidence, nor in refusing a new trial, and its judgment ought then to be affirmed, and it is so.

NELSON V. THE BANK OF THE STATE OF MISSOURI.

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Petition in debt will lie on a negotiable promissory note discounted by the Bank of the State of Missouri. The 29th section of the bank charter was not intended to limit the remedy upon notes discounted by the Bank, but to fix the liabilities of the several parties to the instrument.

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Appeal from the Court of Common Pleas of St. Louis county.

J. B. King for Appellant.

That the appellee cannot maintain petition in debt in this cause. See the act incorporating the Bank of the State of Missouri, sec. 29, p. 19, of the Board Acts of 1836 and 1837.

Also, there is no assignment averred in the petition in this case as required by law. See the act in the Digest of Mo., page 449, giving the remedy by petition in debt of the instrument sued on, as the law requires.

Opinion of the Court by Napton, Judge.

The Bank of Missouri sued the appellant by petition in debt, on a promissory note made by Nelson to John McEvoy, and by McEvoy endorsed to Francis Impey, and by Impey endorsed to the Bank. Defendant below demurred to the petition. Demurrer was overruled and judgment given for the Bank.

To reverse this judgment, it is urged that petition in debt will not lie on a note negotiable, discounted by the Bank of Missouri. The latter clause of the 29th section of the Bank charter is supposed to sustain this position. By that section it is provided that "all bills and notes, whether under seal or otherwise, at any time discounted by said Bank, shall be and are hereby placed upon the same footing as foreign bills of exchange, so that the like remedy shall be had for the recovery thereof, against the drawer or endorser thereof, and with the like effect, except so far as relates to damages."

This section was not intended to fix or limit the remedy

Petition in debt will lie on a negotiable promissory note discounted by the Bank of the State of Missouri. The 29th section of the bank charter was not intended to limit the remedy upon notes discounted by the bank, but to fix the liabilities of the several parties to the instrument.

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upon notes discounted at Bank, but to fix the liabilities of the several parties to the instrument. Such was the construction given by this court to a similar provision in the act concerning bonds and notes. The case is not now accessible, but it is believed that this case rests upon precisely the same principle upon which that was determined.

Judgment affirmed.

LACKEY V. LANE & McCABE.

The circuit court having opportunities, greatly superior to those enjoyed by the Supreme Court, of determining whether a verdict is against the weight of evidence, and whether a new trial should be granted, its judgment will not be reversed for refusing to grant a new trial on the ground that the verdict was against the weight of evidence, unless a very flagrant case be made out.

Appeal from the Court of Common Pleas of Saint Louis county.

John B. King for Appellant.

The court of common pleas erred in overruling said motion for a new trial, for the reasons therein filed, because the jury found a verdict greatly against the weight of testimony, which motion ought to have prevailed. See page 361, section 16, Mo. Digest.

T. B. Hudson for Appellees.

1st. That by the evidence it is clearly shown, that the charges and specifications contained in the bill of items are correct, and the customary charges made by physicians and surgeons for like services in St. Louis. Then as to the correctness of the value of the services and attendance there can be no question, if the services were actually rendered. 6 Mo. Decisions, 61; 5 Mo. Decisions, 493, Mulliken v. Greer.

Opinion of the Court by Scott, Judge.

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Lane and McCabe sued Lackey for medical services, before a justice of the peace, and recovered judgment, and on appeal to the court of common pleas, judgment was affirmed. The only question arising on the record, and the only complaint of the appellant, is the refusal of the court to grant a new trial, for the reason that the verdict was against the weight of evidence. This court cannot see that the court below erred in this matter. That court has opportunities greatly superior to those enjoyed by this court, of determining whether the verdict is against the weight of testimony, and whether a new trial should be granted.

When the court below has refused a new trial, demanded simply because the verdict is against the weight of evidence, it must be a flagrant case which would justify the interference of this court. The difference between the amount admitted to be due, and that given by the verdict, being so small, the court was well warranted on that ground alone in refusing a new trial.

Judgment affirmed.

Lackey

v.

Lane and
McCabe.

The circuit court having opportunities greatly superior to those enjoyed by the supreme court, of determining whether a verdict is against the weight of evidence, and whether a new trial should be granted, its judgment will not be reversed for refusing to grant a new trial on the ground that the verdict was against the weight of evidence, unless a very flagrant case be made out.

LEPPER V. CHILTON.

Where no objections were made to the reading of depositions until they were offered in evidence and then they were objected to on the ground that there was no proof that the witnesses were not within reach of the process of the court, the court very properly allowed that objection to be removed by the introduction of other testimony.

Error to St. Louis Circuit Court.

Darby for Plaintiff.

1st. That the circuit court erred in permitting the depositions to be read in evidence, because the defendant below had no notice of taking the same, as required by the statute.

2d. That the circuit court erred in permitting the plaintiff

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below to offer evidence to the court pending a motion made to reject said depositions, as to the residence of the witnesses whose depositions were read, after the plaintiff had closed his case.

3d. No evidence whatever was given to the court to show that the defendant was a non-resident, to warrant the serving a notice to take said depositions on his attorney.

4th. That the depositions themselves contain hearsay evidence, and should have been rejected on that ground.

5th. The defendant was not identified in any evidence offered to the court.

6th. The damages are excessive, and are not sustained by any evidence offered, and that the circuit court erred in overruling the motion for a new trial. Elliot v. Bobb, 6 vol. Mo. Rep. 323; Boyce v. Anderson, 2 Peter's Rep. 150; Kean v. Newell, 1 vol. Mo. R. p. 755; March v. Howell, 1 vol. Mo. Rep. p. 138; Morton v. Reed, 6 vol. Mo. Reports, p. 64; 2 vol. Mo. Rep. page 189, Montgomery v. Farrar.

Skinkers for Defendant.

The only questions to be considered by this court are whether,

1st. The verdict was against evidence, or the weight of evidence, and,

2d. Whether the court erred in allowing the witness at that stage of the proceedings to prove the residence of the witnesses whose depositions had been read.

As to the first point, the opinion of the court as frequently expressed at the present term, is cited. Upon the second, the court is referred to 1 Starkie Ev. 92; Grisley's Eq Evidence, 236.

Opinion of the Court by Napton, Judge.

This was an action of assumpsit brought by the defendant in error against Lepper, to recover damages for the breach of a special contract between the parties. The bill of exceptions presents the following state of facts. The de-

fendant in error, Chilton, on his way from Virginia to this State, reached Cincinnati, on the morning of the 16th of May, 1840, and applied to Lepper, the master of a steam-boat then lying at the wharf, for a passage on his boat for himself, his family, slaves, &c. The price was agreed upon between Lepper and Chilton, or his agents, and the plaintiff in error agreed and promised that his boat should leave the port of Cincinnati that evening, Chilton having represented to him, that upon no other terms would he consent to ship his slaves on the said boat. Repeated conversations were had between the captain and Chilton, or his agents, in all of which repeated assurances were given by Lepper that the boat would leave that evening. The fires were accordingly started and steam raised, as if for immediate departure, and the slaves of Chilton were transferred to the boat of Lepper. The boat did not start until the ensuing day, and during the night one of Chilton's slaves escaped, in the recovery of which he expended one hundred and ninety-five dollars.

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Verdict and judgment was for the plaintiff Chilton, and motion for a new trial made and overruled

On the trial, the plaintiff offered in evidence several depositions, to the reading of which depositions defendant objected on the ground that it did not appear but that the witnesses whose depositions were taken, were within the reach of the process of the court. Pending this motion to exclude the depositions, the court allowed the plaintiff to prove that fact, and thereupon overruled the defendant's motion.

To reverse the judgment below, the plaintiff in error relies on the following points :

1st. The plaintiff in error objects to the sufficiency of the notice given of the time and place of taking depositions, said notice having been served on defendant's counsel.

2d. The plaintiff in error objects to the action of the court, allowing plaintiff to supply proof of the residence of the deponents, pending the motion to exclude the depositions.

3d. The depositions themselves contain hearsay testimony.

4. The verdict was unsupported by the testimony.

The first and third points relied on, are not available to

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the plaintiff in error in this court. It does not appear what the rules of the St. Louis circuit court are in relation to the proper time of making objections to depositions; No objections seem to have been taken in the circuit court to the sufficiency of the notice; if any objection existed, it has been waived, nor was the attention of the circuit court directed to the hearsay testimony, which it is here alleged the depositions contained.

Where no objections were made to the reading of depositions until they were offered in evidence, and then they were objected to on the ground that there was no proof that the witnesses were not within reach of the process of the court, the court very properly allowed that objection to be removed by the introduction of other testimony.

As it does not appear from the bill of exceptions, that the defendant made any objections to the depositions until they were offered in evidence, and then for the first time objected to their being read, because there was no proof that the witnesses were not within the process of the court, the court very properly allowed the plaintiff to remove that objection by introducing witnesses for that purpose.

The details of the testimony in this case I deem it unnecessary to state, as the court are of opinion that every material allegation in the declaration was well found for the plaintiff. Judgment affirmed.

Judge Scott not sitting.

BENOIST & HACKNEY V. POWELL & WILSON.

A new trial will not be granted unless the motion for a new trial in the circuit court, and the grounds upon which it is asked, are preserved in a bill of exceptions.

Error to the Court of Common Pleas of St. Louis county.

Darby for Plaintiffs in Error.

The question is, as the plaintiffs made out their case, was the evidence offered by the defendants, sufficient to justify the court in giving a verdict and judgment for the defendants. The plaintiffs contend that it is not. Revised Code, p. 105, sec. 6 and 7; Baily on Bills, p. 50, sec. 6; Mason v. T. Rumsey, sen. and T. Rumsey, jr., p. 384, 1 Campbell's Rep.; Baily on Bills, p. 52; Winship v. the Bank of the Uni-

ted States, 5 Peters; S. C. R. page 529; Baily on Bills, p. 58; Bank of Rochester v. Brown, 7 Wendall, 158; Baily on Bills, page 58, Johnson v. Thompson, page 355, 3 vol. Missouri Reports; Martin v. Hays, 5 vol. Missouri Rep. 63; Williams v. Circuit Court of St. Louis county, 5 vol. Mo. Rep. page, 248; Pratte v. Blakey, 5 vol. Mo. Rep. page 205.

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Gamble & Walker for Defendants.

1st. That where one partner gives the notes of the firm, for his private debt, the other partner is *not* liable when the notes are issued without his knowledge or consent, and the person receiving them *knows they are not for a partnership debt*. Lansing v. Gaine & Ten Eyck, 2 John. Rep. 300; Livingston v. Roosevelt, 4 Johns. Rep. 278, 279; Mercein v. Andrus, 10 Wendall's Rep. 461; Lloyd v. Freshfield, 22 Eng. Com. Law Reports, p. 382; Green v. Deakin, 3 Eng. Com. Law Rep. p. 377; Spireff v. Wilks, 1 East. Rep. 48; Ridley v. Taylor, 13 East. Rep. 175; Chagounes v. Edwards, 3 Peck. Rep. 15; 3 Kent's Commentaries, p. 42.

2d. The fact that *P. & J. Powell*, and not *Peter Powell & Co.*, endorsed the original note, is, in the absence of rebutting testimony, conclusive proof to show that the money was not obtained for the firm of P. Powell & Co. Livingston v. Hostie, 2 Come's Rep. 246; Dobb v. Halsey, 16 Johns. 34; 3 Kent's Com. p. 43; Foote v. Salim, 19 Johns. 154.

Opinion of the Court by Tompkins, Judge.

Benoist and Hackney brought their action against Powell, Fontaine and Wilson, and judgment being given against them, they come into this court to reverse that judgment.

The suit was brought on a promissory note made by Thomas L. Fontaine, payable to Peter Powell & Co, which company consisted of the defendants in this suit. The evidence showed that this promissory note was endorsed by Peter Powell & Co., and delivered to the plaintiffs, Benoist and Hackney. The endorsement was proved to be in the

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hand writing of said Thomas L. Fontaine, the maker of said note, and one of the firm of Peter Powell & Co.. A clerk in the house of Peter Powell & Co. testified that he was at the store when the notice of this note becoming due was given : that he received the notice, and handed it to said Fontaine, who put it into his pocket : that there were no funds in the house of Peter Powell & Co. to meet said note: that the proceeds of the note could not have been applied to the business of the firm without some "*record*" being made of it. The defendants introduced another witness, who stated that he was a clerk in the house of the plaintiffs, Benoist & Co., and that he was present when the note sued on was given "in lieu of, and to lift another note, given by said Fontaine, endorsed by Peter Powell & Co. The original transaction was in the fall of 1839, on which Fontaine gave to the plaintiffs a note signed by himself as maker, and by P. & J. Powell, as endorsers. This note fell due, and was renewed several times by Fontaine giving a new note with P. & J. Powell as endorsers, and finally the endorsement was changed by a new note given by said Fontaine, and endorsed by Peter Powell and Co. Witness did not know to what purpose the money originally obtained on the note was applied, nor did he know whether the plaintiffs knew that the money was obtained by Fontaine for his individual purpose, or to what purpose the same was applied ; but that he supposed it was for Fontaine's individual use, as it was his individual note ; and he said Fontaine personally negotiated the original loan and all said renewals : that he presumed the endorsement of Peter Powell & Co. was for security ; that he did not know of any dealings in the way of loaning money and discounting notes between the plaintiffs and defendants on account of Peter Powell & Co. except the transaction above stated by the witness."

The bill of exceptions having detailed, first, the evidence of Joseph V. Garnier, next of Waters, a clerk in the house of Peter Powell & Co., and thirdly, that of the last witness, clerk in the house of Benoist & Co., the plaintiffs, concluded thus: "To the giving of the said testimony of the said Waters, as hereinbefore stated, said plaintiffs by their coun-

sel objected; and said testimony was given on the trial of this cause. To the finding of the court sitting in this cause as a jury, and the judgment of the court therein, the plaintiffs by their counsel objected, and this, their bill of exceptions, is made out and signed by the judge as testimony in the case accordingly."

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The only matter that could be properly excepted to among those above enumerated, is the testimony of Waters. I do not see that it is liable to any objection; and accordingly on the argument of the cause in this court, the counsel of the plaintiff's contended for a new trial, which they say was improperly denied by the circuit court. The bill of exceptions contains no motion for a new trial. The clerk's history of the proceedings in the court shows a motion for a new trial, with the usual reasons; and also an affidavit of Benoist, one of the appellants, stating the discovery of new evidence since the trial of this cause. If a new trial should be granted him, he expects to prove by Joseph Powell, originally a member of the firm of P. & J. Powell, that he said Joseph Powell endorsed the notes first mentioned by the witness, Hays, clerk of the plaintiff's, Benoist & Co., for said Thomas L. Fontaine, and that the facts of the said endorsements having been afterwards made by Peter Powell & Co., were known to the said firm of *said company*; and that by other testimony he expects to be able fully to establish that said members of said firm of Peter Powell & Co. were fully liable on said endorsement, &c. Admitting that all this was saved in the bill of exceptions, still a new trial ought not in my opinion to be granted. Where is the residence of this newly discovered witness, Joseph Powell, the man who endorsed as a partner the name of P. & J. Powell as security on several notes made by this same Thomas L. Fontaine, for this same sum of money, with an increase of interest now demanded in this cause? We are not told that he is a resident of the city of St. Louis. But from the facts detailed in evidence we are left to presume that he is a merchant long residing in the place. The circumstance that Fontaine always negotiated this loan in person, and first procured Joseph Powell to endorse the name of the firm of P. & J. Pow-

A new trial will not be granted unless the motion for a new trial in the circuit court, and the grounds upon which it is asked, are preserved in a bill of exceptions.

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Wilson.

el on his notes as security, and that he afterwards endorsed on notes made by himself the name of Peter Powell & Co., of which company he himself was one, was enough to induce the plaintiffs to believe that the money was for Fontaine's private use; and who could be more likely to prove that this drawing was known, if such were the case, to Peter Powell, one of the firm of P. & J. Powell, and at the same time one of the firm of Peter Powell & Co. It might be thought almost gross negligence not to have summoned Joseph Powell in the first instance, living, as it were, at the court house door; at least there is nothing shown to raise a presumption that he is not a man of some length of residence in the city of St. Louis. If for such reasons as this, new trials were to be granted, it would be vexatious to suiters, and to dishonest men an opportunity might be afforded to tamper with witnesses; and a new trial would be little else than an appeal from one jury to another. But the matter not being saved in the bill of exceptions nothing more need be said. The judgment of the circuit court is affirmed.

POTTER V. DILLON.

If an acceptance be given in the name of the firm by one of the partners for his own separate use, and that fact is not known to the other party, the firm is bound by the acceptance.

Appeal from the Court of Common Pleas of Saint Louis County.

Gamble & Walker for Appellant.

1. The law is settled that, where one partner signs the name of the firm, as makers, endorsers, or acceptors of a note or bill, without the knowledge or assent of the other partner, to discharge his individual debt, or for purposes not connected with the partnership business, and the payee or person receiving such note or bill, knows the circumstances

under which it is given, the other partner is not liable. SEPT'R TERM,
 Foote v. Sabin, 19 Johns. Rep. 154; Dobb v. Halsey, 16 **1841.**
 Johns. Rep. 38; Lansing v. Gaines, 2 Johns. Rep. 300; Li-
 vingston v. Roosevelt. 4 Johns. 278; Lloid v. Freshfield, 22
 English Com. Law Rep. 382; 3 Kent's Com. 42; New York
 Ins. Co. v. Bennett, 5 Cowen, 574; Green v. Caldwell, *ibid.*
 489.

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 v.
 Dillon.

2d. One partner cannot bind the firm by using the name of the firm for his own private debt, without the knowledge or assent of his copartners. *Livingston v. Hostie and others*, 2 *Carie's Rep.* 246; *Green v. Deakin*, 3 *English Com. Law Rep.* 377; *Sherif v. Wiltis*, 1 *East. Rep.* 48; *Ridby v. Taylor*, 13 *East. Rep.* 175; *Walden v. Sherburn*, 15 *Johns.* 409; *Whitaker v. Brown*, 11 *Wend.* 75.

3d. Nor can one partner bind his copartner by using the name of the firm for his own private debt, when the creditor taking the note or bill, knew that it was given for his individual debt, or for purposes not connected with the partnership, even where the other partner knew at the time of the name of the firm being used for such purpose. *Mercein v. Andrus*, 10 *Wendall*, 461; *Foote v. Sabin*, 19 *Johns.* 154.

4th. And the burthen of proof in such cases is on the creditor to show that such other partner authorised or assented to the use of the name of the firm by one partner for his individual debt. *Chazournes v. Edwards and Frost*, 3 *Pickering Mass. Rep.* 5; *Foote v. Sabine*, 19 *Johns.* 154; 3 *Kent. Com.* 43; *Lovesty v. Barr*, 1 *Wend.* 529; *Schemerhorn v. Schemerhorn*, *ibid.* 119.

Holmes for Defendant.

The court will not set aside the verdict of a jury unless it appear to have been manifestly against evidence or the weight of evidence, unless palpable injustice has been done, and the cause be of sufficient value. *Graham on New Trials*, 362, 368; 3 *Mo. Reports*, 464, 467; 4 *Mo. Rep.* 295, 301; *Steph on P. C.* 96. Verdict must be decidedly against the weight of evidence, 12 *Wend.* 27; 11 *Wend.* 143; 2 *Cowen*, 479; 9 *Johns. R.* 36.

SEPT'R TERM,
1841.*Opinion of the Court by Tompkins, Judge.*Potter
v.
Dillon.

Potter brought this suit against Dillon before a justice of the peace. The matter being submitted to the justice, he found a verdict and gave a judgment for the plaintiff.

The defendant Dillon then appealed to the court of common pleas. In this court the evidence was detailed to a jury, and a verdict being found by them for the plaintiff, the court gave a judgment accordingly.

The suit is brought on a bill of exchange drawn by one Charles F. Downing on Reilly and Dillon, in favor of the plaintiff, Potter. This bill was accepted in writing by Reilly and Dillon. The acceptance was in the handwriting of Reilly : at the time of the acceptance Reilly was a partner of Dillon in business. Evidence was given by the defendant to prove that nothing was found on the books of Reilly and Dillon to show that there had ever been any dealings betwixt the plaintiff and the firm of Reilly and Dillon ; but that previously to the partnership betwixt them there had been some business transactions betwixt the plaintiff and Reilly, which were not known to be settled. That the drawer had been, and was at the time the bill was drawn, a clerk of Reilly and Dillon. A letter from the plaintiff to Dillon was also read in evidence, in which Potter states that he holds an order drawn by Charles F. Downing for one hundred dollars, and accepted by Reilly and Dillon, &c. He says something is due, he supposes about fifty dollars. The court instructed the jury that if they believed that this acceptance was given by Reilly to plaintiff to pay a separate debt of Reilly, and that Potter knew that Reilly was using the partnership name to secure his own private debt, they will find for the defendant. The defendant moved for a new trial for the usual reasons, that the verdict was against evidence, &c., and that the jury were misled by the instructions of the court.

If an acceptance be given in the name of the firm by one of the partners for

The instructions of the court were in my opinion, and according to the showing of the defendant himself in his brief, very correct. This being my opinion, it might be sufficient to stop, but the defendant, appellant here, seems to

think that after a finding against him by a justice of the peace acting the part of a jury, and also by a jury acting under the direction of the court of common pleas, that still the finding is against evidence. To order a new trial in such a case would be but an appeal from one jury to another, with this further evil, that it would hold out a temptation to parties, even honest parties, to be negligent in the production of their evidence in the first trials. The court of common pleas, with better opportunity to judge of the credit due to the witnesses, than we have, was satisfied with this verdict. But the defendant has not even taken the precaution to exclude the presumption that there might have been other evidence given to the jury. The judgment of the court of common pleas is affirmed.

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his own separate use, and that fact is not known to the other party, the firm is bound by the acceptance

SWAN & DEMING V. O'FALLON & POLK.

1. A plea in the nature of a plea in abatement, under the act authorizing that plea in cases of attachment, only denies the facts alleged in the plaintiff's affidavit as the ground of the attachment. A misnomer cannot be taken advantage of under that plea, but must be specially pleaded in abatement.
2. An erasure cannot be proved by the opinion of a witness founded on inspection of the instrument, however skilled he may be in judging of handwritings. Whether the instrument were erased or not was a fact for the jury to find on inspection of the paper and evidence.

Appeal from the St. Louis Circuit Court.

Crockett & Gist for Appellants.

1st. Did the court err in refusing the instruction to the jury asked by the appellants, upon the trial of the issue upon the plea in abatement? Upon this point the counsel for the appellants respectfully submit, that in proving the fact, that a firm composed of Elisha Swan and Anson L. Deming were doing business in Illinois in January and February, 1840; the plaintiffs in the circuit court did not, thereby, directly or

SEPT'R TERM, indirectly, establish the fact that Elisha Swan and *Nelson*
1841. *Deming* were non-residents of this State in July, 1840.

Swan & Dem. There was no proof whatever that the firm at Lacon, Illinois,
ing v. was the same which executed the note sued upon, nor was
Polk & O'Fal. there any evidence conducing to prove their identity.
lon.

2d. Did the court properly refuse to permit the witness, Shaw, to answer the question propounded by appellants? We believe no principle is better established, than that in all controversies relating to handwriting, the opinion of persons skilled in such matters, is competent evidence; 1 Starkie's Evidence, 54; 1 Philips' Evidence, 373-4; 4 Term R. 497; 4 Esp. Rep. 117-145; 2 Saund. on Pleading & Ev. 554, (side page.)

3d. The court erred in admitting the note and endorsement in evidence, for the reason that it will *palpably* appear upon an inspection of the endorsement, that it has been erased, and was consequently inoperative at the time of the finding in the court below.

4th. For the reasons above stated, the court should have granted a new trial, which was refused.

Polk for Defendants.

1. That the circuit court did right to refuse the instruction asked by the defendants below on the issue framed on the plea in the nature of a plea in abatement. Chitty's Bills, 353; Chitty's Bills, (8th edition,) 579-580; Dickinson v. Bowes, 16 East, 110.

2. That the court below committed no error in overruling the motion of the defendants below, for a new trial of the issue on the plea in nature of a plea in abatement. Campbell & Maison v. Hood, 6 Mo. Rep. 217.

3d. That the circuit court rightly adjudged that the question put by defendants below to the witness Shaw, was illegal and improper. 1 Stark. Ev. 14, 48, 69.

4. That the court below did right in overruling the motion for a new trial of the issue on the plea in bar. 6 Mo. Rep. 217.

Opinion of the Court by Tompkins, Judge.

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1841.

Polk & O'Fallon sued Swan & Deming in the circuit court, and having there obtained a judgment against them, they appeal to this court.

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lon.

The suit was brought on the statute, i. e. by petition in debt. The petition states that they, the plaintiffs, are the legal owners of a note against the defendants, Elisha Swan and Nelson Deming, executed by them by the name, style and description of Swan and Deming, to the following effect :

\$519 28.00.

St. Louis, 10th May, 1839.

Six months after date we promise to pay to John Riggin and Bro. or order, five hundred and nineteen dollars and 28 cents., &c. Signed, Swan & Deming.

This note was assigned to Polk & O'Fallon, by Riggin & Bro., and the plaintiff procured a writ of attachment, to issue against the goods, &c. of the defendants. On this writ the sheriff made this return, that he had attached certain property in his return enumerated, and that he had offered to read the writ and declaration to Anson L. Deming, which he refused to hear. Afterwards the defendants filed two pleas; the first of which was in these words :

Swan & Deming.	}	On attachment.
ads.		
Polk & O'Fallon.		

The said defendants by their attorneys pray judgment of the said petition and summons, and of the attachment issued thereon, because they say that the affidavit filed by said plaintiffs, with their said petition, by virtue of which said attachment issued, together with all the facts stated in said affidavit, are untrue, &c.

The second plea denied the assignment by Riggin, &c., to the plaintiffs.

The material words of the affidavit, the truth of which is denied in the first plea, are these following, viz : " that Elisha Swan and Nelson Deming, the defendants named in the foregoing petition, are justly indebted unto Trusten Polk and John O'Fallon, the plaintiffs therein named, after

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lon.

Following all just credits, &c., in the sum of five hundred and forty dollars and forty-seven cents, on account of the same promissory note herewith filed, and a copy of which is contained in the foregoing petition, and also that this affiant has good reason to believe, defendants are not residents of, or residing in the State of Missouri," &c. On the trial of the issue made on the first plea, the defendants gave evidence to prove that the firm of Swan and Deming was composed of men named Elisha Swan and Anson L. Deming, instead of Nelson Deming, and the witness stated that he knew no such man as Nelson Deming; and that they resided in Illinois.

The plaintiffs gave in evidence two promissory notes, filed with the petition in this cause.

This being all the evidence offered, the defendants moved the court to instruct the jury that if they believed from the evidence that the firm composed of Elisha Swan and Anson L. Deming reside in Illinois, it is not sufficient evidence that the firm composed of Elisha Swan and Nelson Deming are non-residents of this State. The court refused to give the instruction; and its opinion was excepted to.

A verdict was found and judgment given against the defendants, on this issue; and they moved for a new trial; assigning for reason that the court refused the instructions asked by them; and that the verdict was against evidence. Their motion was overruled.

The defendants then went to trial on the issue made on the second plea. The plaintiffs called a witness, who proved the assignment of the note. The defendants by their counsel, asked the witness if he was not skilled in judging of handwritings, and if so was it not his opinion that the endorsement on the back of the note had not been erased since it was originally made. The court, on motion of the plaintiff, directed the witness not to answer the question. Exception was taken to this decision of the court. A verdict being found and judgment given against the defendants on this issue, they moved for a new trial; and their motion being overruled they appeal to this court.

It is assigned for error in the judgment on the plea in

abatement, that the court refused to give the instructions asked by the defendants, and should therefore have granted a new trial.

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It is assigned for error in the judgment on the issue made on the second plea, that the court excluded proper and competent evidence, and these were also the reasons for a new trial on the last issue.

On the error assigned in the judgment of court rendered on the issue made on the plea in abatement, it is to be observed that the defendant, Deming, should have pleaded the misnomer. The plea of misnomer is technically a plea in abatement, and not favored in law. In 1st Bacon, title abatement, letter D, these observations are found, viz: "But, though a defendant may by pleading in abatement, take advantage of a misnomer, when there is a mistake in the writ or declaration, as to the name of baptism or sur-name; yet in such a plea he must set forth his right name so as to give the plaintiff a better writ. One defendant cannot plead a misnomer of his companion; for the other defendant may admit himself to be the defendant. The defendant, though his name be mistaken, is not obliged to take advantage of it; and therefore if he be impleaded by a wrong name, and afterwards be impleaded by his right name, he may plead in bar the former judgment, and aver that he is *una et eadem persona*."

Again, in 3d Bacon, title error, letter K, 5, it is said "A man shall never assign that for error, which he might have pleaded in abatement, for it shall be accounted his own folly to neglect the time of taking that exception.

The form of the plea is peculiar. The form of a plea of a defendant's christian name, as found in Chitty's pleadings, p. 901, is this:

C. D. sued by the name of E. D. }
ats. }

A. B.

And C. D. against whom the said A. B. hath exhibited his said bill by the name of E. D., comes and says that is named, &c.

Our statute declares that in all cases where the property

SEPT'R TERM, or effects of any defendant shall be attached, he may file by
1841.

Swan & Deming v. Polk & O'Fallon. himself or attorney, a plea in the nature of a plea in abatement, without oath, putting in issue the truth of the facts alleged in the affidavit, on which the attachment was sued out.

A plea in the nature of a plea in abatement, under the act authorising that plea in cases of attachment, only denies the facts alleged in the plaintiff's affidavit as the ground of the attachment. A misnomer cannot be taken advantage of under that plea, but must be specially pleaded in abatement. Upon such issue the plaintiff shall be held to prove the existence of the facts alleged by him, as the ground of the attachment; and if the issue be found for him the cause shall proceed; otherwise the cause shall be dismissed, &c. Sections 11 and 12, of the act to amend an act to provide for the recovery of debts by attachment, p. 6, of the session act of 1839.

The facts sworn to here in order to procure the attachment, are, as above stated, that Elisha Swan and Nelson Deming, the defendants named in the foregoing petition, are justly indebted, &c., and that the affiant has good reason to believe, &c, that the defendants are not residents, &c. The defendants then come, and instead of Deming pleading the misnomer of his christian name according to the rules above cited, the two defendants commence the plea in the form usual when there is no misnomer, admitting thereby that they are the persons sued, and do not pretend to contest the truth of the material facts, non-residence and indebtedness, and after admitting by their own plea that they are the real defendants, require the circuit court to instruct the jury that if they believe the firm composed of Elisha Swan and Anson L. Deming reside in Illinois, it is not evidence that the firm composed of Elisha Swan and Nelson Deming are non-residents of this State! At common law it has been shown, a plea commencing in the manner this did, would be construed to admit the identity of the defendants, and our statute gives a plea only in the nature of plea in abatement, not for the purpose of putting in issue the christian name of Deming, but the fact of his residence or non-residence in the State of Illinois. The circuit court, in my opinion, committed no error in refusing to instruct the jury as required, and consequently it committed no error in refusing to grant a new trial, on the issue made on the plea in abatement.

On the exception taken to the decision of the court in refusing to permit the witness to tell the jury whether it was his opinion that the endorsement on the back of the note sued on had been erased, this single observation may suffice, viz: that it cannot be perceived how skill in judging of handwritings can enable a witness to judge what is an erasure better than another man who knows how to write and knows the meaning of the word erasure. Whether the endorsement were erased or not, was a fact for the jury to find on inspection of the paper and evidence, and the court committed no error, in my opinion, in refusing to permit the witness to tell them his opinion on the subject. This evidence being properly excluded, and no other being offered, the court consequently committed no error in refusing to grant a new trial. The judgment of the circuit court is affirmed.

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lon.

An erasure cannot be proved by the opinion of a witness, founded on inspection of the instrument, however skilled he may be in judging of handwritings. Whether the instrument were erased or not was a fact for the jury to find on inspection of the paper and evidence.

Scott, Judge.

I concur in affirming the judgment and awarding damages.

WEIMER V. SHELTON.

1. If a plea professes in its commencement to answer the whole cause of action, and afterwards answers only a part, the whole plea is bad on general demurrer.
2. A general averment, in a plea of usury, that a certain sum was for usurious interest "upon other and preceding transactions," without specifying in what way that usurious interest accrued, does not comply with the meaning of the statute, which requires the "special facts" to be stated.
3. A security may avail himself of the defence of usury as well as the principal. An endorser for accommodation is regarded in the light of a security, and as such is entitled to avail himself of any defence which would have availed the maker.

Appeal from the Circuit Court of St. Louis county.

J. B. Bowlin for Appellant.

The only question here is as to the validity of the plea.

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1841.

Weimar
v.
Shelton.

The plea shows an amount of usury that covers the whole sum claimed, and avers the note void. The demurrer admits the usury, and so admitting avoids the note under the statute. See R. C. page 333, sec. 4.

C. D. Drake for Appellee.

1st. That the record shows nothing to rebut the conclusion that evidence was given under the common counts, upon which the court below might properly have rendered the judgment it did. There should have been a bill of exceptions to show that no such evidence was given.

2d. That the matters set forth in the defendant's last plea constitute a defence personal to Call, the maker of the note, of which the defendant cannot avail himself, unless he shows himself to be an accommodation indorser for Call, without consideration, which the plea does not show; but, on the contrary, authorises the conclusion that he was indorser for value.

3d. That an endorser for value cannot inquire into the consideration passing between the maker and the indorser, he not being privy to the matter.

4th. That the plea is vague, uncertain and indefinite, in setting out the alleged usurious contract between Call and Shelton.

5th. The plea prays a deduction from the note of \$90, which by defendant's own showing was not reserved as interest on the note sued on, but on other notes previously given.

6th. That the plea alleges an inconsistency, in stating in one place the \$90 to have been for usurious interest accrued on other notes, and in another place designates it as a part of the usurious interest agreed by Call to be paid for the forbearance of the sum of three hundred dollars.

Opinion of the Court by Napton, Judge.

John G. Shelton brought an action of assumpsit against Weimar, on a negotiable note drawn by one George W.

Call to the order of said Weimar, and endorsed by Weimar SEPT'R TERM.
1841. to the defendant in error. The note was for three hundred dollars, payable in four months. The déclaration contained a special count on the note and the common counts. The defendant, Weimar, pleaded, first, non-assumpsit; second, set-off; third, payment; and lastly, a special plea in bar, setting forth a usurious transaction between Call and Shelton. This last plea commenced in the form usual when the plea is designed to answer the whole action; it averred that the note was given in pursuance of a usurious agreement between Call & Shelton, in which Shelton advanced to Call one hundred and fifty dollars, and took his note at four months, for three hundred dollars, sixty dollars of which was usurious interest upon the sum advanced, and ninety dollars was usurious interest upon other and preceding transactions; which preceding transactions are not set forth in the plea. The plea concludes as follows: "wherefore the said defendant saith, that in pursuance of the statute aforesaid, he the said defendant is entitled to a deduction of the said sums of sixty and ninety dollars aforesaid, from the amount of said note in the said first count of the plaintiff's declaration mentioned, and that the said plaintiff ought to be barred from having and recovering of him the said defendant, so much of the amount in said note specified, as amounts to the usurious interest so corruptly retained as aforesaid, all which he the said defendant is ready to verify, wherefore he prays judgment if the said plaintiff ought to have and maintain his action aforesaid against him."

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v.
Shelton.

To the first three pleas the plaintiff replied and took issue, and demurred to the fourth. The demurrer was sustained, and the defendant had leave to amend; afterwards leave to amend was waived, and the remaining pleas were withdrawn, and judgment given by *nil dicit* against the defendant. Weimar, relying on his fourth plea, brings the case here by appeal.

The objections to this plea are two-fold. The plea in form commences by professing to answer the whole action, and does not propose to answer a part only. The defendant says that "the plaintiff ought not to have or maintain

If a plea
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A general
averment, in
a plea of usu-
ry, that a cer-
tain sum was
for usurious
interest "up-
on other and
preceding
transactions"
without spe-
cifying in
what way
that usurious
interest ac-
crued, does
not comply
with the
meaning of
the statute,
which re-
quires the
"special
facts" to be
stated.

A security
may avail
himself of the
defence of
usury as well
as the princi-
pal. An en-
dorsor for ac-
commoda-
tion is regard-
ed in the light
of a security,
and as such is
entitled to
avail himself
of any defence
which would
have availed
the maker.

his aforesaid action thereof against him, because," &c., pro-
fessing in its commencement to answer the whole cause of
action, it only answers a part, and in conclusion prays judg-
ment as though the whole cause of action were answered.
The whole plea was therefore bad on general demurrer. 1
Chitty on Plea. 555; Hallett v. Holmes, 10 Johns. R. 28;
Nevins v. Keeler, 6 Johns. R. 64; 1 Saund. 28, No. 3;
Everard v. Patterson, 6 Taun. 646; Woodward v. Robin-
son, 1 Str. 303.

The form of the plea is also objectionable in this: that the
transaction in which the ninety dollars of usurious interest
accrued, is not set forth. The statute says it shall be lawful
for the defendant to set forth the *special fact* in pleading,
and a general averment that a certain sum was for usurious
interest, without specifying in what way that usurious inter-
est accrued, does not comply with the meaning of the act.

It remains to be considered whether if the plea were
amended in these particulars, it would constitute a good de-
fence to the action. This question is not necessarily involv-
ed in the determination of this case, but a case between the
same parties, involving this question, having been remanded
by the court at its present term, an opinion on the merits
of this defence is deemed proper. The court are all of opin-
ion that a security may avail himself of the defence of usu-
ry, as well as the principal. An endorser for accommoda-
tion is regarded in the light of a security, and as such is en-
titled to avail himself of any defence which would have
availed the maker. As the act regulating interest stood at
the institution of this suit, the excess of the usurious interest
over the real sum of money advanced was adjudged against
the lender, and it became a debt of record, upon which the
party setting up the usury could on motion have judgment.
This provision presents a serious difficulty in allowing this
defence to be set up by a security, as it would seem to be
the intention of the legislature that the party whose neces-
sities had been taken advantage of should alone be entitled
to the benefit of this provision. But however this may be,
and whatever would be the proper course when a case of
this kind arises, it is clear that to construe the act so as to

preclude securities from setting up its provisions as a defence, would enable usurers, by a very simple and easy device, to evade the law completely. Under the act as it was amended at the last session of our General Assembly, I apprehend this difficulty will not arise, defendant being by that act merely relieved from the payment of usurious interest, and the penalty imposed on the lender going to the common school fund.

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1841.

King
v.
Lane.

Judgment affirmed.

KING, administrator, v. LANE.

1. It is a general and well established principle of law, that in contracts, the time of limitation depends on the law of the country in which the action is brought, and not on the law of the country where the contract is made. For although contracts are to be construed according to the laws of the country in which they are made, or according to the laws of that country, in reference to which they are made, yet the remedy on them must be conformable to the laws of that country in which the remedy is sought.
2. The saving of actions against persons out of the State in the 7th sect. of 2d art. of the statute of "Limitation," (R. C. 1835, p. 394,) extends to foreigners, or those who have resided altogether out of the State, as well as to citizens of the State, who may be absent for a time. Whether the defendant be resident of this state, and occasionally absent, or whether he resides altogether out of the State, is not material. If the cause of action arises abroad, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within this State.

Appeal from the St. Louis Circuit court.

Opinion of the Court by Scott, Judge.

Wm. B. King and Ann F. Lane were residents of the State of Virginia, in the year 1825. While still residing there, King executed two bonds to Lane, payable in November, 1826, afterwards in the year 1834, King left Virginia and became a resident of this State, and some years there-

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King
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after died, and the appellant administered on his estate. Anna F. Lane is still a resident of the State of Virginia, and commenced this suit against the appellant in July, 1840.

The question arising upon this state of facts is, whether an action of debt on the bonds is barred by our statute of limitations, limiting an action of debt on bonds and promissory notes to ten years.

It is a general and well established principle of law, that in contracts, the time of limitation depends on the law of the country in which the action is brought and not on the law of the country where the contract is made. For although contracts are to be construed according to the laws of that country in reference to which they are made, yet the remedy on them must be conformable to the laws of that country in which the remedy is sought.

It is a general and well established principle of law, that in contracts the time of limitations depends on the law of the country in which the action is brought, and not on the law of the country where the contract is made; or in other words, on the *lex fori*, and not on the *lex loci contractus*. For although contracts are to be construed according to the laws of the country in which they are made, or according to the laws of that country in reference to which they are made, yet the remedy on them must be conformable to the laws of that country in which the remedy is sought. This principle was early recognized in the English jurisprudence.

In the case of *Duplex v. De Roven*, 2 Vernon, 540, a bill was filed for a discovery of assets and satisfaction of a debt contracted in Rome, and the English Statute of limitations was pleaded, and the court allowed the plea. In the case of *Stirrhos v. Graeme*, 2 Blackstone Rep. 723, and 3 Wilson R. 145, the plaintiff was beyond seas in Germany, and had always resided there. Upon a demurrer to this fact set out in a replication to a plea of non assumpsit, *infra sex annos*, the court said, if the plaintiff is a foreigner, and doth not come to England in fifty years, he still hath six years after his coming to England to bring his action; and if he never comes to England himself, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. In the case of *Williams v. Jones*, 13 East. 439, both plaintiff and defendant resided in India, when the promise on which the action was founded was made, and continued to reside there for more than six years after the making of the promise, and afterwards upon the return of the defendant to England, upon a demurrer to a plea of non assumpsit, *infra sex annos*, the court held that the plaintiff was not barred. By the common law the plaintiff

had an unlimited right of suit, till barred by the statute of ^{SEPT'R TERM,} limitations. The statute contains exceptions, and if the ^{1841.} plaintiff brings himself within those exceptions, there is no statute restraining his right of action. By the word plaintiff in the statute is included as well foreigners as residents; foreigners who are not, and who never have been within the State; and the word defendant also includes foreigners who may contract abroad, and afterwards come into the State.

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Whether the defendant be resident of the State, and is occasionally absent, or whether he resides altogether out of the State, is not material. If the cause of action arises abroad, it is sufficient to save the statute from running in favor of the party to be charged until he comes within our State. It is not to be inferred that because the statute uses the word "return," that therefore it contemplates only residents, who occasionally go abroad; it was designed to apply to foreigners who always reside out of the State, and who may be found here to be served with process, as well as to residents. In the case of *Ruggles v. Keeler*, 3 Johnson, Judge Kent, in a masterly manner sustains this construction of the English statute of limitations, which so far as the merits of this case is concerned, is like our own. As to the question, whether this case is to be determined by the act of limitation of 1825 or 1835, it will be remarked, that the 11th section, 3d article of the act of 1835 says, that if the action accrued before the taking effect of the said act, the statute of 1825 shall give the limitation. This action accrued before the act of 1835, and is consequently subject to the statute of 1825. The application of this statute to the pleadings in this cause will show that errors have been committed by the court below in overruling and sustaining demurrers, and this is an apology for not giving a statement of the pleadings. But as on the record all the facts appear, and as there is no dispute about them, and as upon the whole, judgment has been rendered for the party who was in the right, judgment affirmed.

The saving of actions against persons out of the State, in the 7th sec. of 2d art. of the statute of 'Limitation,' (R. C. 1835, p. 394,) extends to foreigners, or those who have resided altogether out of the State, as well as to citizens of the State, who may be absent, for a time. Whether the defendant be resident of this State, and occasionally absent, or whether he resides altogether out of the State, is not material. If the cause of action arises abroad, it is sufficient to save the statute from running in favor of the party to be charged, until he comes within this State.

Judgment will still be rendered for the plaintiff against the appellant, as administrator of Wm. B. King, and the judg-

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ment below being against the appellant personally, is reversed, and judgment will be entered in conformity to this opinion, and the appellee will pay the costs.

HINSON v. THE STATE.

In an indictment, under the 8th section of 8th article of the act concerning "Crimes and Punishments," (R. C. 1835, p. 236) for "lewdly and lasciviously" abiding and cohabiting, it is sufficient to charge the offence as having been committed on a certain day, and it is not necessary to charge the offence with a continuando. It seems that proof of a single act of such criminal intercourse would not of itself be sufficient to sustain the indictment.

Appeal from the Jefferson Circuit Court.

Primm for Appellant.

The appellant has brought his cause here by appeal, and he assigns for error on the part of the circuit court, that they refused,

First, To arrest the judgment;

Second, To grant him a new trial.

Opinion of the Court by Tompkins, Judge.

This indictment is founded on the 8th section of the 8th article of the act concerning crimes, in the words of the act.

It charges, in the words of the act, that Isham Hinson, late of, &c., being a married man, and not married to Diana Smith, unlawfully did lewdly and lasciviously abide and cohabit with the said Diana Smith, contrary to the form, &c.

There was a motion for a new trial and in arrest of judgment.

In an indictment under the 8th sec. of 8th art. of the act concerning

First. Against the indictment it is alleged that a single act of cohabitation, not constituting the indictable offence of abiding and cohabiting, the indictment should have charged the offence with a continuando.

The indictment in the case of the Commonwealth v. Calif, 10th Massachusetts Reports, 153, is framed on a statute precisely similar. The defendant in that case admitted that one act of criminal intercourse betwixt him and the woman named in the indictment could be proved, and it was agreed betwixt him and the attorney general, that if such evidence was in the opinion of the court sufficient to maintain the indictment, the defendant would on his arraignment plead guilty to the indictment, and submit, &c. The court being of opinion that such proof would not sustain the charge of associating and cohabiting together (for that is the language of the Massachusetts act,) discharged the prisoner, observing that such evidence might have maintained a charge of adultery. The attorney general of Massachusetts thought it a good indictment, and the court did not seem to think otherwise, for on defect of evidence alone was the prisoner discharged. The counsel for the appellant seemed also to think that the evidence to maintain the charge was slight. Had I been a juror, I could have reconciled myself to find a verdict of guilty on much slighter evidence than what was given in this cause. Because, then, the indictment seems well enough framed, and that there is no deficiency of evidence, the judgment of the circuit court will be affirmed.

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'Crimes and Punishments' (R. C. 1:35, p. 26.) for "lewdly and lasciviously" abiding and cohabiting, it is sufficient to charge the offence as having been committed on a certain day, and it is not necessary to charge the offence with a continuando. It seems that proof of a single act of such criminal intercourse would not of itself be sufficient to sustain the indictment.

ROSS v. CRUTSINGER.

Fraud in fact is a question with the jury, and any secrecy in the transaction, or circumstances indicative of concealment, or of a design to give one the appearance of being the owner of property which he does not own, are circumstances of fraud. But the jury are to weigh such evidence, and may or may not deduce fraud in fact therefrom.

Appeal from the Circuit Court of St. Louis county.

Bowlin & Woodruff for Appellant.

1st. That the circuit court erred in refusing the instruc-

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tions asked by the defendant's counsel. The three first of which were in substance : That the possession of personal property by the vendor, after the sale, whether absolute or in trust, is fraudulent and void in law as against creditors prior or subsequent, and would be subject to execution or attachment, as any other property of the vendor in possession. 6th vol. Mo. Reps. p. 575; the R. C. page 283, Statute of Frauds; 3 Mo. Rep. 290; 2d vol. Mo. Rep. 231; 15 vol. Wendall, 212; 1 Powell on Mortgages, pages 36, 37, 8 Term Rep. 140 : 3 Maul and Selvin, 374 ; 3 Price, 6 ; 9 Johnson, 337.

2d. That the court erred in refusing the fourth instruction, which is, in effect, that the conveyance of chattels and retaining possession in the vendor, without recording the deed or giving notice, is void as against creditors and subsequent purchasers, and if void as against creditors, it is equally void as to purchasers under their executions. Statute of Frauds, page 283, R. C.; Mo. Rep. vol. 6th, 575; 3 Mo. R. 290, and the authorities above quoted.

3d. That the court erred in its instruction to the jury. It had no application to the case before the court in the proof ; it is a mere abstraction, and however good it might be, as an abstract principle of law, it afforded no light to the jury, but served to confuse them.

4th. That the court erred in refusing a new trial, for the verdict was clearly against the evidence, both as it regards the principles involved in the case, and the amount of the damages, being more than double as much as fixed by any witness. See Trime's case, reported in the Law Library, vol. 19, page 1 ; see also authorities above referred to.

J. B. Walker, for Appellee.

1st. There is a distinction between an absolute and a conditional sale of chattels, as to the vendors retaining possession after sale. The possession by vendors after sale, even in an unconditional sale, is not a fraud *per se*, but only a badge of fraud, that may be rebutted by evidence that it was a *bona fide* transaction, and the possession was consistent

with the agreement honestly made. *Brooks v. Powers*, 15 SEPT'R. TERM, Mass. Reps. 244; *Badlaw v. Tucker*, 18 Mass. Rep. 389. 1841.

2d. The possession by vendor, of personal property, after sale, if it be a conditional sale or mortgage, is no evidence of fraud, because such possession may be consistent with the trust or mortgage deed, and is not presumed to give a false credit to vendor. And if goods are mortgaged to secure a debt, and there be an agreement that mortgagor shall retain possession, a fraudulent sale against creditors cannot be presumed. *Badlaw v. Tucker*, 18 Mass. Rep. 389; 2 Kent's Com. pages 512, 531; *Marsh v. Lawrence*, 4 Cowen, 461; *Burrow v. Paxton*, 5 Johns. 258; *Beals v. Guernsey*, 8 Johns. 446; *Craig v. Ward*, 9 Johns. 197; *Anderson v. Van Allen*, 12 Johns. 343; *Cole v. Davies*, 1 Ld. Raymond, 724, cited in *Sturtevant v. Bullard*, 9 Johns. 340; and *Maggott v. Mills*, 1 Ld. Raymond, 286.

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3d. In this case there was no possession after mortgage inconsistent with the deed, and the creditor, Clopper, had notice of the deed of trust before attaching, and the defendant below, had notice of the deed before purchasing under the execution in favor of Clopper. The deed of trust then cannot be fraudulent on account of secrecy as to them.

4th. A mortgage of personal chattels, without change of possession, has been held valid—In Maine, 3 Shepley's Rep. 48, cited in 46th No. Amer. Jurist, 447; in Massachusetts, 18 Mass. Rep. 389; in New Hampshire, 5 N. H. Rep. 545; in New York, 19 Wendall Rep. 514, (cited in 44th No. American Jurist, 453; also, in case of *Hoe & Co. v. Lock*, (a recent case reported in New York Courier of Jan. 14th. 1841); New Jersey, Halstead's Reps. 155; North Carolina, 1 Badger v. Devereaux, 76, cited in 2 Kent, Virginia; 6 Randoiph's Reps. 82; Tennessee, 3 Yerger's Rep. 475, 502; Kentucky, 2 Dana's Rep. 204.

Opinion of the Court by Tompkins, Judge.

Ross was plaintiff below, and having obtained a judgment against Crutsinger, he appealed to this court.

On the trial of the cause the plaintiff gave in evidence a

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deed of trust made by one Hervey to the plaintiff for the benefit of James S. Queissenberry, upon a horse which was the property in question in this suit, and a lot of groceries at a store in the neighborhood, to secure the sum of two hundred and twenty-five dollars, which the maker of the deed admits in his deed to be due to Queissenberry, the one half on the first day of September, and the other on the first day of January then next, viz: after the 19th day of May, 1838. The horse was sold on execution, and Crutsinger became the purchaser, with the knowledge of the deed of trust above mentioned. The horse had been purchased by Hervey aforesaid from Queissenberry, and to secure the payment for this horse the deed had been made as aforesaid to the plaintiff, giving him for Queissenberry's use this lien on the horse and groceries.

The defendant then proved that Hervey for about one year had this horse in his possession next before he was taken into possession by the officer who sold him under process issued by a justice of the peace. The witness stated that Hervey claimed and used the horse as his own; also that he never heard that either Queissenberry or the plaintiff set up any claim to the horse till Hervey left the country: that Hervey left the country in debt, and under pretence of an intention to return: that he left the country indebted to the witness and others to the amount of two or three hundred dollars, in the spring of 1839, and told the witness to keep the horse till his return: the witness claimed the horse to pay for his keeping; but his claim was not allowed. Witness was neighbor to Queissenberry, and Hervey had boarded with him at his house, and kept the horse there. It was a seed horse. The plaintiff in the execution under which the horse was sold, testified that he had seen the deed of trust, and knew of it before he attached the horse: that the debt which the horse was sold to satisfy, was contracted for money loaned to Hervey to purchase the horse. This witness, with several others, testified to the same facts mentioned by the first witness of the defendant. The defendant also examined Ross, the plaintiff, who stated that he had never been informed that the horse had been conveyed to

him in trust until Hervéy had left the country, although SEPT'R TERM, 1841. Hervéy before he left the country, had told him that he had purchased the horse.

This being the evidence in the cause, the counsel of the defendant and appellant moved the court to instruct the jury—

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1st. That in all transfers of personal property, in order to make the transfer valid as to creditors and subsequent purchasers, it is necessary that possession should accompany the deed or instrument conveying the property, unless there be some sufficient reason shown for the possession not being changed.

2d. That when personal property is mortgaged or conveyed in trust, for the purpose of securing a creditor, it is necessary that the possession should be changed, otherwise the property thus conveyed will be subject to execution, attachment, or the claim of subsequent purchasers.

3d. The mortgagee is entitled to the possession of personal property, and in order to protect such property from the claim of creditors, it is necessary that the possession should be given at the time of giving the mortgage, or a sufficient reason given for the property not being given at that time.

4th. A conveyance in trust of a chattel interest, unless the possession accompanies the transfer, or the deed of trust is recorded, is fraudulent against creditors and subsequent purchasers without notice, and if it was fraudulent as against Clopper, the attaching creditor, it is equally so against the purchaser under Clopper's judgment.

The circuit court refused to give these instructions, but gave the following, viz:

Fraud in fact is a question with the jury, and any secrecy in the transaction, or circumstance indicative of concealment, or of a design to give a man the appearance of property which he does not own, are circumstances of fraud, but the jury are to weigh such evidence, and may or may not find or deduce fraud in fact therefrom. The defendant excepted to the opinion of the court refusing to give the instruction asked by him, and also to the instruction given as above by the court.

Fraud in fact is a question for the jury, and any secrecy in the transaction, or circumstances indicative of concealment, or of a design to give one the appearance of being the

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owner of property which he does not own, are circumstances of fraud. But the jury are to weigh such evidence, and may or may not deduce fraud in fact therefrom.

In the case of *Shepherd v. Trigg*, decided at Lexington at the last term of this court held there, it was decided that although property mortgaged by the father of Trigg, the defendant in error, had remained in the possession of the father till his death, the son living under the same roof with the father all the time, this was not conclusive evidence of fraud. This court decided that the circuit court committed no error in permitting the defendant in error to give evidence to the jury of a valuable consideration paid, and other evidence to prove the honesty and fairness of the transaction. That case not now being before us, we cannot go into any detailed examination thereof, nor do I conceive it necessary. I am not inclined to believe that the circuit court committed any error in refusing to give the three last of the instructions asked by the defendant. The instruction given by the court seems to have supplied well enough the place of the first asked by the defendant, and the jury seem to have been told plainly enough that they were at liberty to find for the defendant, if they had thought there was any thing fraudulent in the transaction betwixt Queissenberry and Hervey. Ross seems to have been a mere nominal party to the suit.

The judgment of the circuit court is therefore affirmed.

CONSAUL & BARBER, Garnishees of JENKINS, v. LIDELL.

A motion for a new trial was argued by briefs in writing before the Judge of the St. Louis circuit court, whose commission expired before the motion was decided, or a bill of exceptions signed. A bill of exceptions was presented to his successor, with the affidavits of the witnesses sworn and examined on the trial, stating the testimony given by them respectively. The latter judge signed the bill of exceptions, and afterwards refused, on the motion of the opposite party, to strike the bill from the record. Held, that the latter judge had no right to sign the bill of exceptions without the consent of the opposite party, as the statute requires that exceptions to the opinion of the court shall be taken in the progress of the trial. (R. C. 1835, title "Practice at Law," art. 4, sect. 20, p. 464.)

Appeal from the St. Louis Circuit Court.

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1st. We hold that the circuit court had jurisdiction of the motion for a new trial, and was competent to grant or refuse it, that it was constrained to do one or the other of these two things. Here then was a function without any specific legal remedy. The court was right in coming at the difficulty in some way that justice might be done. All that could reasonably be required was that it should conform its proceedings to peculiar exigencies and circumstances of the case. This was done. The appellee not agreeing with the garnishees as to the evidence presented by them, to remove all doubts the court resorted to the witnesses, whose testimony was spread upon the record, to enable it to pronounce its judgment upon the motion. Tidd's practice, 914. It is admitted that the more appropriate remedy would have been to permit the facts of the case to be found by a jury upon a *venire de nove*, and if it be insisted that the facts do not appear, or are not legally upon the record, inasmuch as the garnishees were not guilty of such fault as amounted to negligence, this court will remand the cause for a new trial, rather than suffer the rights of the garnishees to be prejudiced by a mere interregnum of the court below. 1 Randolph, 461, and cases there cited; 7 Cowen, 103. But here was an appeal to the equitable powers of the court, for summary relief, and its action is not the subject of a bill of exceptions, 1 Binney, 222; 12 Johnson, 31; 3 Green, 377; and cases there cited; 6 Mo. Reports, 208. At common law there was no bill of exceptions; it was first introduced by the statute of Weston 2, (13 Edw.) which appoints no time within which the bill must be drawn up and signed. Tidd's practice, 863. Our act in express terms requires the exception to be taken during the progress of the trial. The construction given to the statute of Weston, amounts to the same thing. 1 Salk. 288. But though generally taken during the trial, the bill may afterwards be put into form and signed. Tidd's practice, 863; 9 Wheaton, 657-8. The irregularity, if any, in the proceedings of the court below,

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After an unsuccessful motion to strike out the bill of exceptions, both parties argued the motion of a new trial, upon the facts then spread upon the record. The appellee is therefore estopped from denying that the facts spread upon the record are legally there; he there adopted them, and admits them here, and puts himself upon the law of his case. 3 Green, 144, and cases cited. At all events this court is authorised in regarding that part of the case which applies to the instructions refused and given, as disclosed by the bill of exceptions. 11 Wend. 431, 439. The bill of exceptions having been filed in the court below, and returned here under the seal of the court to which the writ of error is directed, has itself become a record, and cannot now as such be disputed. Besides, this court has already manifested a disinclination to interfere with the manner in which the circuit court may choose to make up its own records. 6 Mo. R. 572.

Skinkers for Appellee.

The appellee moves to set aside the bill of exceptions, or strike it from the records, for the following reasons:

1st. Because the bill was not presented for signature in the progress of the trial, or some note in writing made of the facts by the presiding judge, or by the counsel for the appellants, and submitted to him for correction at that time. On this point see Revised Statutes of Mo. p. 464, sec. 20, 21; 9 Wheaton, 651; 4 Peters, 107; 1 Salk. 288; Middleburg v. Collins, 9 J. R. 346; 3 Cow. 33.

2d. Because the bill was signed by Judge Mullanphy, who did not preside, and not by Judge Lawless, who did preside on the trial of the cause. R. St. of Mo. page 464, sec. 21, 22; 3 Cow. 33; 4 Peters, 107; 9 J. R. 346.

3d. Because if Judge Mullanphy were competent to sign the bill, he could do so only upon a re-examination of all the witnesses, who testified upon the trial, in the presence of both parties, and not upon the affidavits of the witnesses taken by the appellants, without notice before justices of the peace.

4th. Because if it were admissible to receive such affidavits so taken, yet the affidavits of all the witnesses should have been, but were not taken.

5th. Because in some instances the affidavits of persons other than the witnesses who testified were taken, as to the evidence of those witnesses upon the trial, and no reason assigned for the failure to take the affidavits of the witnesses themselves. 1 Stark. Ev. 158.

6th. Because these last mentioned deponents did not repeat the words of the witnesses, whose evidence they proved, but merely swore to their substance or effect. 1 Phill. Ev. 274; 4 T. R. 290.

7th. Because they did not swear with precision and positively as to such evidence, but vaguely and according to their belief.

8th. Because the bill of exceptions was improvidently executed; was irregular and against law.

9th. Because the bill of exceptions does not state that all of the evidence given on the trial was contained in the bill. 5 Mo. Rep. 529; 2 Mo. R. 190; Digest, 464, sec. 20-1-2; 4 Peters, 107, ex parte Bradstreet; 9 Johnson, 346, Medberry v. Collins, &c.; 3 Cowen, 32, Campbell v. Shult.

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Opinion of the Court by Tompkins, Judge.

This was a suit commenced by Jenkins against Lidell, in the circuit court, in which judgment was rendered for Jenkins.

Jenkins moved the court to strike from "the record in this cause a bill of exceptions signed by the court for the garnishees, Robert Barbour and Joseph Consaul, as irregularly signed and made a part of the record. This motion was overruled by the court, and the decision of the court overruling such motion was excepted to.

The judge of the circuit court has made a statement of the case, of which a copy will be taken, as better calculated to explain the case than any statement that I, perhaps, could make; it is as follows:

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Be it remembered, that this case was tried on the — day of —, of this year, (1841,) and the motion for a new trial was argued by briefs in writing before the former judge of this court, whose commission expired before he decided the motion, or signed the bill of exceptions; and this bill of exceptions is now presented to the court, with the affidavits of all the witnesses sworn upon the trial, except one, stating what was the testimony given upon the trial; and as to that one whose affidavit is not presented, the affidavit of counsel is presented, showing what was his testimony; and the present judge of this court knowing nothing personally of the evidence given on the trial, or of the proceedings therein, receives the said affidavits to show the facts stated in this bill of exceptions, as the plaintiff does not agree with the garnishees upon the evidence given on the trial, and objects to the judge signing a bill of exceptions in this case upon the affidavits filed, which objections the court overrules, and, at the prayer of the garnishees, signs this bill of exceptions for the garnishees, and orders that the same may be made a part of the record.

The act regulating practice at law, provides that "when-ever in the progress of any trial in any civil suit depending in any court of record, either party shall except to the opinion of the court, and shall write his exception, and pray the court to sign the same, the person or persons composing the court, or the major part of them, shall, if such bill be true, sign the same; and if they refuse to sign the same on account that it is untrue, they shall certify thereon, under their hands, the cause of such refusal." See 20th section of 4th article, page 464, of the digest of 1835.

This section evidently contemplates the exception being taken during the trial of the cause, and signed by the court during such trial, or at least that the exceptions should be allowed during the trial. The 22d section of the same article contains the only intimation of a case in which time is given; that is, when the judges shall have refused to permit any bill of exceptions, signed by by-standers, to be filed, and shall have certified that it is untrue, either party is allowed five days to take affidavits in relation to its truth.

A motion for a new trial was argued by briefs in writing before the judge of the St. Louis circuit court, whose commission expired before the motion was decided,

The statute of Westminster, giving bills of exceptions in England, is different from ours, and the English writers say that although no time be appointed by this act, when the justices shall put their seals, the party must pray the same before judgment; but if they deny it, then may they be commanded, after judgment, to put their seals, and the putting of their seals after judgment, shall be sufficient. 2d Bacon, 780; title, bill of exceptions. The same article continues, "where a corporation book was offered in evidence to prove a member of the corporation not in possession and refused, and no bill of exceptions was then tendered, nor was the exception then reduced to writing, and the trial proceeded and a verdict was given for the plaintiff; the court being moved for a bill of exceptions at next term, it was urged for the bill, that the law requires, *quod proponat exceptionem suam*, and no time is appointed for reducing it to writing, and a party is not grieved till a verdict is given against him; and the same memory that serves the judges for a new trial will serve for a bill of exceptions. On the other side, it was said that this practice would prove a great difficulty to judges, and delay of justice; that the precedents and entries suppose the exception to be written down upon its being disallowed, and the statute ought to be construed so as to prevent inconvenience; besides the words of the act are in the present time, and, so is the writ formed on the act. Holt, Chief Justice: If this practice should prevail, the judge would be in a strange condition; he forgets the exception and refuses to sign the bill; you should have insisted on your exception at the trial. The statute indeed appoints no time; but the nature and reason of the thing requires the exception should be reduced to writing, when taken and disallowed; not that they need be drawn up in form, but the substance must be reduced to writing whilst the thing is transacting, because it becomes a record. So the motion was denied.

This is the construction given to the English statute, where confessedly the statute fixes no time. But our statute indicates in the strongest terms, that the exceptions shall be reduced to writing, and signed during the trial.

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or a bill of exceptions was presented to his successor, with the affidavits of the witnesses sworn and examined on the trial, stating the testimony given by them respectively. The latter judge signed the bill of exceptions, and afterwards refused, on the motion of the opposite party, to strike the bill from the record. Held, that the latter judge had no right to sign the bill of exceptions without the consent of the opposite party, as the statute requires that exceptions to the opinion of the court shall be taken in the progress of the trial. (R. C. 1835, title "Practice at Law," art. 4. sect. 20, p. 464.)

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The cases of *Shepherd & Storrs*, and of *Campbell v. Schult*, 3d Cowen, 32, show that the supreme court, New York, have held that exceptions ought to be written down at the time they are taken; and that even when exceptions were mentioned on the trial, and one or more of the judges intimated that this would be sufficient, the bill was not allowed. The court further says, "the exceptions should have been reduced to writing at the trial or during the term. To the same purpose see *Medberry v. Collins* and *Mead*, 9th Johnson, 346; also *ex parte Bradstreet*, 4th Peters, 107; where Chief Justice Marshall says that the law requires that a bill of exceptions shall be presented at the trial. But the usual practice is to request the judge to note down in writing the exceptions, and afterwards during the session of the court to hand him the bill of exceptions, and submit it to his correction from his notes." Had the late judge taken notes of the evidence, and after he was out of commission signed a bill of exceptions, this, according to an intimation of the court of New York in the cases above cited, would have been good. But I have always believed that under our law the bill of exceptions ought to be presented for signature during the trial, unless dispensed with by consent of parties. But we see here not a bill of exceptions made out from the notes and recollection of a judge, but some days after the trial, witnesses are called up to tell what they had before stated, after parties had had an opportunity to tamper with them; which is, in my opinion, much more exceptionable than for a judge to sign a bill of exceptions at a subsequent term.

But it is said that it is a hard case that the party should, by the act of the law for which he is in no way accountable, lose his right. To this, then, there is an obvious answer, that this court may, when the law permits, give it that construction which is best calculated to advance the interest of parties. But here the parties have taken a liberty in which even the English law, much less strictly worded than ours, was not, as has been shown, construed to indulge suitors, and now they seem to expect to be aided by judicial legislation. Whenever, in the progress of any trial, (says

the 20th section above quoted,) in any civil suit in any court of record, either party shall except to the opinion of the court, and shall write his exception, and pray the court to allow and sign the same, &c. Can any man read this and think that he can, consistently with these words, put off this business till another day? It is impossible. But we are told it is very inconvenient to comply with this law. This, however, has long been the law, and its meaning is obvious enough. Why, if it be so inconvenient to observe it, has not the legislature been applied to for an amendment? No better law could be made. The English law was more loosely worded, yet the English courts have uniformly said that the bills ought to be presented during the trial, but parties were indulged during the term and no longer. If parties choose to risk more than the law allows them, and any unforeseen accident occur, either by the act of God or of the law, they must take to themselves the consequences of their rashness, and not look to this court so to construe the law that they may suffer no evil from the consequences of their carelessness. It certainly greatly expedites business to write out bills of exceptions *at leisure*, during term time; but who that has the least experience does not see that even this indulgence requires great kindness and candor on the part of the counsel and their clients? Each is apt to recollect most conveniently for his own interest, and who can say that the judge is authorised to decide betwixt them, when the statute provides for the possibility of a difference in opinion about facts between the judge and a party, and gives such party, too, an opportunity to contradict, and even disprove, if he can, the correctness of a judges statement of the facts testified to? If any truth be plain and obvious it is this, that he who defers till another time to do what he ought to do at the present time, must take to himself all the consequences of his negligence. The law allows them to take their exceptions in the progress of the trial, and the court is required to sign the bill of exceptions when presented. They have elected to do otherwise; and by the act of the law, being deprived of the aid of the judge, who might have relieved them from their embarrassment, they

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come here to establish by affidavits of witnesses what it was their duty to have taken down at the trial, and to have required the judge to certify to be true. On these terms alone was the testimony of these witnesses to be spread on the record of the circuit court, and it is in vain that we are asked if the statement of the witnesses on oath is not as good evidence of what he swore to, as the certificate of the judge of the court.

Grant that never a dishonest man was sworn in a court house, and that all suitors are too honest to tamper with witnesses; and moreover grant that all witnesses are too wise and too honest to suffer themselves to be tampered with, still this court has no authority to substitute such evidence for that required by the law. And whence, it may be demanded, does the clerk of the circuit court, or any other officer, derive his authority to administer an oath to a witness to re-state what he had before sworn to on the trial of the cause. The whole business was, in my opinion, *coram non judici*, and, consequently, there can be no bill of exceptions in the cause. The motion, then, to strike out the bill of exceptions, is sustained.

Scott, Judge.

As the judge below signed the bill of exceptions under such circumstances as would have prevented this court from compelling him to do so by mandamus, I concur in sustaining the motion to strike the bill of exceptions from the record. See 3d Cowan, 32.

HUMBERT V. ECKERT.

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1841.Humbert
v.
Eckert.

A second new trial can only be granted for the reasons enumerated in the statute, viz: when the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior.

Appeal from the Court of Common Pleas of Saint Louis county.

Bowlin & Woodruff for Appellant.

1st. That the court erred in excluding all evidence of the marriage of Auguste Voght with her first husband, by general reputation, living together, and holding themselves out as such to the world. Day Rep. 166; Starkie Ev. 939, and cases cited; and Roscoe Ev. 241.

2d. That the court erred in refusing evidence of Voght's death, by general reputation currently received and approved amongst his friends.

3d. That the court erred in refusing to grant a new trial.

Polk for Appellee.

1st. The bill of exceptions shows that *the very evidence was permitted to go to the jury*, the exclusion of which is assigned as one reason for granting a new trial. But even supposing that the court below did exclude proper testimony from the jury, this could no more be a ground for a second trial, than misdirection by the court below would be. Yet this court has expressly decided, in the case of Thill v. Deavor, at its last May term, that a new trial cannot be granted for misdirection of the court.

2d. The motion, the overruling of which is excepted to, is the *second* motion for a new trial, in the same cause, and in support of the motion there is not assigned a single one of the reasons for which alone by our statute, (see Rev. Code, 1835, page 470, sec. 2) a second new trial can be granted. So that even supposing the reasons to have existed, yet as they were not assigned, the court could not notice them, and of course could do nothing else than overrule the motion. Dickey v. Malechi, et al. 6 Mo. R. 177.

SEPT'R TERM,
1841.*Opinion of the Court by Napton, Judge.*Humbert
v.
Eckert.

A second new trial can only be granted for the reasons enumerated in the statute, viz: when the triers of the fact shall have erred in a matter of law, or when the jury shall be guilty of misbehavior.

This was an action of assumpsit, instituted by Eckert, before a justice of the peace, against the plaintiff in error, on a promissory note executed by Auguste Voght, Simon Gotz, and Susannah Voght, for \$78. Humbert, who intermarried with Auguste Voght after the execution of the note, was made a defendant. Judgment against plaintiff in error was obtained before the justice, and an appeal taken to the circuit court, from which court the case was removed to the court of common pleas, where a trial de novo was had, and a verdict again obtained against Humbert. Upon his motion, the verdict was set aside, and a new trial granted, and a second verdict obtained against the plaintiff in error, who again appealed for a new trial, and alleged for causes, that the verdict was against law, against evidence, and because the court excluded the testimony of the defendants below to establish a reputed marriage between Auguste Voght and Lewis Voght, afterwards the wife of the said Humbert, and the reputed death of Lewis Voght. This motion for a second new trial was overruled by the court, exceptions were taken, and an appeal taken to this court.

From the bill of exceptions it appears that all the testimony, the exclusion of which is complained of here, was actually given. The only ground upon which any reliance can be placed, is the refusal of the court of common pleas to grant a second new trial. A second new trial can only be granted for certain reasons enumerated in our statute on that subject, and neither of those reasons was alleged in the motion, or pretended to have existed. The judgment must therefore be affirmed.

STEIGERS V. GROSS.

SEPT'R TERM.
1841.

A person named in the writ as a defendant, but upon whom the writ is not served, is no party to the action, and his liability to the plaintiff, in the contract, is not affected by the result of that action. He is, therefore, a competent witness for the defendant, if released from his liability for contribution.

Steigers
v.
Gross.

Appeal from the St. Louis Circuit Court.

Callahan for Appellant.

The appellant insists that the court below did err in rejecting the proposed witness on the ground of incompetency by reason of interest in the suit.

1st. Because the witness could have had no interest going to his competency, other than that arising from his liability to contribution. Peake's Ev. 144, 145; 1 Stark. on Ev., 140, 145; 10 John. Rep. 21; 4 Bibb, 320, 330; 18 John. Rep. 352; 2 Aikers (Vermont) Rep. 138; 15 John. Rep. 270; 16 Mass. Rep. 118; 13 do. 148; 18 do. 118; Peake's Ev. 138; 3 N. Hamp. Rep. 115; 1 Stark. on Ev. 127, 130; 5 Mo. Rep. 476; Chit. on Bills, 413.

And 2d. Because that interest was removed by the release from the appellant to him. Peake's Ev. 154, 158, 170; 1 Swi. Dig, 748.

Darby for Appellee.

The interest of the witness may be divested before trial, by payment or release, and his competency will then be restored. Roscoe on Evidence, page 93. The general rule on this head is that no objection can be made to the competency of a witness, unless he is directly interested in the event of the suit, or can avail himself of the verdict in the cause so as to give it in evidence on any future occasion in support of his own interest. Roscoe on Evidence, page 81; T. Reports, 62, Smith v. Prayer.

To have rendered Francis Steigers competent as witness, therefore, the release should have been from the plaintiff; the co-defendant in the same transaction, could not qualify him or render him competent. It is clear, also, that if Mat-

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1841.

Steigers
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Gross.

thias Steigers could have proved payment of this note, by Francis Steigers, and had obtained a verdict in his favor, this same verdict would have been a full and complete bar to a recovery on the same note against Francis Steigers, and by this means the witness would have been directly interested in the event of the suit, and consequently coming within the rule as above laid down, his testimony was properly rejected by the court as incompetent. 1 Starkie, p. 121; 2 Starkie, pp. 747, 748. A witness is also interested, if the record would be the instrument of securing to him some advantage, or of repelling some charge against him, or claim upon him in a future proceeding. 2 Starkie, p. 747.

But in fact, there was no release whatever in this case. The record shows none. The objection to competency on the ground of interest, is removed by an extinguishment of that interest, by means of a release, executed either by the witness himself, or by those who would have a claim upon him, or by payment. In this case, therefore, no person could execute the release except the plaintiff. 2 Starkie, p. 758. In order to render a witness, by a release, it is necessary to produce it, and prove its execution. This was not done, or attempted in this case. 2 Starkie, p. 760. The court below properly rejected the witness as incompetent.

The record itself shows that the plaintiff entered at the time a remittitur for a much larger sum than the defendant in his brief now sets up, viz: two hundred and twenty-four dollars and fifty-nine cents. Substantial justice has been done.

But the case is definitely disposed of by repeated decisions of this court, for if the bill of exceptions do not contain the whole facts, this court can have no grounds to disturb the judgment below. The office of a bill of exceptions being to save facts that occur in the trial, it is necessary that such facts be set forth in the bill, otherwise the court above can have no grounds to reverse the judgment of the court below. Bartlett v. Draper, 3 vol. Miss. Reports, page 487. And when bills of exceptions are doubtful or imperfect, the court will not intend anything for the benefit of the party, whose duty it was to make the matter plain. 2 vol. Mis-

souri Reports, Collins v. Bowmer, p. 195. And unless a bill of exceptions purports to recite the whole evidence in a cause, the appellate court cannot undertake to say whether the court below should have granted a new trial or not. 5 vol. Miss. Reports, Hughes v. Ellison, page 110, The judgment should therefore be affirmed. Brady's ex'r. v. Waters, 1 vol. Mo. Rep. p. 406; Rector v. McNair, 1 vol. Mo. Rep. page 471.

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1841.

Steigers
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Gross.

Opinion of the Court by Napton, Judge.

The appellee, Gross, sued Matthias and Francis Steigers, by petition in debt, on a note for eight hundred dollars. Gross obtained a judgment for the full amount, but remitted two hundred and twenty-four dollars and fifty-nine cents. From the bill of exceptions it appears that the defendant offered to prove by Francis Steigers, upon whom there had been no service, and whom the defendant had duly released, that two other notes, then in court, had been executed and subsequently paid to the plaintiff by the defendant in part payment of said note sued on. The court excluded the testimony on the ground of incompetency, to which opinion of the court exceptions were saved.

A person named in the writ as defendant, but upon whom the writ is not served, is no party to the action, and his liability to the plaintiff on the contract is not affected by the result of that action. He is therefore a competent witness for the defendant unless he is liable for contribution. A release from that liability renders him competent. Ames v. Whittington, 3 New Hamp. R. 115; 16 Mass. Rep. 118; 2 Starkie Ev. 130; Chitty on Bills, 413; Gibbs v. Bryant, 1 Pick. R. 118.

If from the record in this case it could be seen that the amount remitted by the plaintiff corresponded with the amount which the excluded testimony of F. Steigers would have established to have been paid, it would be apparent that the defendant had sustained no injury by the action of the circuit court in rejecting his witness. As the record nowhere shows how this was, and the remittitur may have

A person named in the writ as a defendant, but upon whom the writ is not served, is no party to the action, and his liability to the plaintiff, in the contract, is not affected by the result of that action. He is, therefore a competent witness for the defendant, if released from his liability for contribution.

SEPT'R TERM, 1841. been for a less sum than the payment offered to be proved

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v.
Brotherton.

by the witness, judgment must be reversed, and the cause remanded.

WIMER V. BROTHERTON.

Justices of the peace have no jurisdiction of actions on penal bonds, except constables' bonds, when the demand does not exceed ninety dollars.

Appeal from the Court of Common Pleas of St. Louis county.

Bowlin & Woodruff for Appellant.

The main question that arises in this case is, had the justice jurisdiction on this bond? We contend not. And did the court of common pleas err in refusing to dismiss for want of original jurisdiction? We contend it did. See session acts of 1840-1, creating the court; R. C. page 430, section 1; R. C. page 431, sec. 8; R. C. page 348.

Gamble & Walker for Appellee.

1. The appel'ee contends that the case is clearly within the jurisdiction of the justice of the peace. See article 1, sec. 2 and 3 of Statutes of Missouri, establishing justices' courts, and regulating proceedings therein. Rev. Stat. Mo. page 348; also, see 3d and 4th section of the act concerning prison bounds. Rev. Stat. Mo. page 523; article 1, sec. 2 and 3, Statutes of Missouri.

Opinion of the Court by Scott, Judge.

The only question involved in this case is, whether an action can be maintained in a justice's court on a prison bounds bond, in the penalty of one hundred and forty dollars and ninety-six cents. It is not contended that the bond

in this case is such a one as is contemplated by the 3d section, 1st article of the act concerning justices' courts. That section permits an action to be brought in a justice's court on a bond or note for the payment of any sum of money not exceeding one hundred and fifty dollars. In an action on this bond breaches must be assigned in the declaration, and the sum actually recovered is determined by the nature of the breach. This consideration would show that it cannot be regarded as a bond for the payment of moneys. It is said that as the judgment on this bond must be for a sum clearly within the jurisdiction of a justice, (sec. 4, of the act concerning prison bounds,) his jurisdiction should be sustained. If this view prevailed, then justices would have jurisdiction in actions on all penal bonds when the sum to be recovered did not exceed ninety dollars. This section was not designed to place bonds of this character on a different footing from other penal bonds, but to give a rule for the determination of the amount to be recovered in suits on such bonds. The legislature by express enactment has given justices jurisdiction in actions on constables' bonds when the demand does not exceed ninety dollars. Sec. 23, article 7, of the act concerning justices' courts. This is a strong expression of the sense of the legislature against the exercise of jurisdiction in actions on other penal bonds: Expressio unius est exclusio alterius. This view is strengthened by the terms of the act organizing the court of common pleas for this county. Although that law gives the court jurisdiction in all actions founded on contract when the matter in controversy shall not exceed five hundred dollars, except actions on covenants, penal bonds, &c. It must have been the opinion of the legislature that justices had not jurisdiction in such actions when they denied it to a superior court, and expressly gave that court exclusive appellate jurisdiction from the judgments of justices in all civil cases. And it is not pretended that an appeal could not be taken from the justice's court in this case to the court of common pleas.

Judgment reversed.

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the peace
have no jurisdiction of actions on penal bonds, except constables' bonds, when the demand does not exceed ninety dollars.

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WIMER V. SHELTON,

Wimer
v.
Shelton.

1. On demurrer judgment will be given against the party whose pleading was first defective in substance.
2. In an action against the assignor of a note, not negotiable within the meaning of the statute concerning "Bonds and Notes," the declaration must aver the existence of some fact which, under the statute, renders the assignee liable.

Appeal from the Circuit Court of St. Louis county.

Bowlin for Appellant.

1st. That the plea is good and should have been sustained, and demurrer overruled. The plea alleges a corrupt usurious transaction between the plaintiff below and George W. Call, the maker of the note, and that the whole amount of this note is made up of usurious interest, on which appellant's endorsement was procured.

2d. That if the plea is even bad, the declaration is worse. It sets forth a note, not negotiable under the statute; and does not aver any thing under the statute to entitle him to recover. And the court should have overruled the demurrer to the plea, and as the declaration was bad, should have made it cut back to the first defect, and sustained it to the declaration. See 1 Chitty, page 707, and this rule will hold whether demurrer be special or general. 3 Cranch, 235. That declaration is bad, see R. C. page 105; Missouri Rep. vol. 6, 265.

Drake for Appellee.

1st. That the record shows nothing to rebut the conclusion that evidence was given under the common counts upon which the court below might properly have rendered the judgment it did. There should have been a bill of exceptions to show that no such evidence was given.

2d. Admitting the first count of the declaration to be bad, in not averring the non-residence or insolvency of the maker of the note, or his having been prosecuted with due diligence, still the judgment by *nil dicit* cures the defect, because this court is bound to take it for granted that one of

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those facts was proven on the trial. Revised Code, page ^{SEPT'R TERM,} 468. 1841.

3d. That the matters set out in the appellant's second plea constitute a defence personal to Call, the maker of the note, of which the defendant cannot avail himself, unless he shows himself to be an accommodation endorser for Call, without consideration, which the plea does not show; but, on the contrary, authorises the conclusion that he was endorser for value.

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Shelton.

4th. That an endorser for value cannot inquire into a consideration passing between the maker and the endorsee he not being privy to the matter.

5th. That the plea alleges an inconsistency in stating that the note was given for \$400, due at its date, and embraced \$32 of usurious interest when in fact the note sued on is for \$400 only.

6th. That the plea concludes that the note is void, when, admitting the facts, it is not void.

7th. That the plea does not set out the date of original alleged loan from Shelton to Call.

8th. That no money appears to have been loaned by Shelton to Call, upon which usurious interest could be charged in the note sued upon.

9th. That the plea is inconsistent in the statement of the time for which the usurious interest was agreed to be paid. Bayley on Bills, 2d Am. ed. p. 393; State Bank v. Hurd, 12 Mass. Rep. 172; Mandeville v. Riddle, 1 Cranch's R. 290; Criger v. Armstrong and Barnwell, 3 Johns. cases, 5; Pierce v. Crafts, 12 J. R. 90; Wild v. Fisher, 4 Pick. R. 421; Olcott v. Rathbone, 5 Wendell's R. 490; Mack v. Spencer, 4 do. 411; Rochfeller v. Robinson, 17 do. 206; Cole v. Cushing, 8 Pick. R. 48.

Opinion of the Court by Napton Judge.

This was an action of assumpsit, brought by Shelton against Wimer on a promissory note made by one George W. Call, payable to the order of the defendant, Wimer, and

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Shelton.

endorsed by the defendant to the plaintiff. The note sued on was not a negotiable note within the meaning of our act on that subject. The declaration contained a special count, containing the averments usual in declarations upon negotiable instruments, but containing no averment of the institution of any suit against the maker, or of his insolvency, or of the existence of any fact which under our statute alone renders the assignor liable. The declaration also contained the common counts, for money lent, money had and received, money paid, &c.

The defendant pleaded first, non-assumpsit, and secondly, a special plea setting forth a usurious transaction between Call and Shelton, and the execution of the note sued on in pursuance of such corrupt and usurious contract, and that the defendant endorsed the note for the accommodation of Call.

Issue was taken on the plea of non-assumpsit, and a demurrer filed to the plea of usury. The court sustained the demurrer, and gave leave to the defendant to amend his pleadings.

At a subsequent term, the defendant withdrew his plea of non-assumpsit, and waived his leave to amend his record plea, and the court gave judgment of *nil dicit*. The court conceiving it manifest from the instrument of writing on which the action is founded, that the amount of damages was fixed by said instrument, assessed the damages accordingly without summoning a jury. Judgment was then entered up, and from this judgment defendant has appealed to this court.

Admitting that the plea was bad, the demurrer when sustained, should have reached back to the first count in the declaration. That count contained no averment of any fact, which would under our act concerning bonds and notes authorise a suit against the assignor, and was therefore bad. But the court, after the withdrawal of the plea of non-assumpsit, proceeded to assess the damages, as though the first count in the declaration was still valid. That was the only count containing any description of the note, and the only count which could authorise the court to dispense with the

In an action against the assignor of a note, not negotiable within the meaning of the statute concerning Bonds and Notes, the declaration must aver the existence of some fact which, under

finding of a jury. The plaintiff obtained a benefit from his SEPT'R TERM,
demurrer to which he was not entitled, and the judgment **1841.**
must therefore be reversed.

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vs.
Shelton

Tompkins, Judge.

The entry, in my opinion, shows no judgment on the de- the statute,
murrer, and it is, in my opinion, as if no plea had been renders the
filed. assignee lia-
ble.

Scott, Judge.—I concur.

KING v. CLARK, surviving partner of CLARK & COOK.

Assumpsit on a bill of exchange. The declaration described the bill as being drawn by "George A. Cook," under the name of "G. A. Cook." On the trial the plaintiff offered in evidence a bill drawn by "G. W. Cook." Held, that the variance was material. It was, perhaps, unnecessary to set out the middle name, or initial letter of the middle name, but having done so as a description of the instrument, it became material as a descriptive averment.

Appeal from the Circuit Court of St. Louis County.

J. B. King for Appellant.

The court below erred in not granting the appellant a new trial for the reasons filed.

The circuit court erred in overruling the appellant's motion in arrest of judgment, for the reasons filed.

The court below erred in not giving a judgment of nonsuit in this cause, when moved so to do by appellant's counsel. 2d Starkie on evidence, 148.

Darby for Appellee.

The law provides, Revised Code, page 450, that "suits at law may be instituted in courts of record," except when the statute law of this state otherwise provides; either,

1st. By filing in the office of the clerk of the court a de-

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1841.

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vs.
Clark.

claration setting forth the plaintiff's cause of action, and by the voluntary appearance of the adverse party thereto; or,

2d. By filing such declaration in such office, and suing out thereon a writ of summons, &c. No precise form is required, as to the direction which should be given to the clerk. The mere filing of the declaration, and a verbal request to the clerk to issue a summons, is sufficient.

The objection that the answer of the plaintiff, to the bill of discovery was insufficient, it will be seen by the court, was ample and full. 2 vol. Mo. Rep. *Alexander v. Hayden*, page 211; 3 vol. Mo. Rep. *Martin v. Miller*, p. 135: *Bill & Craig v. Scott*, 3 vol. Mo. Rep. page 212; 3 Starkie, 1603.

Opinion of the Court by Napton, Judge.

This was an action upon a bill of exchange drawn by G. W. Cook, upon the plaintiff in error, and accepted by the said plaintiff. The declaration describes the bill as being drawn by George A. Cook, under the name of G. A. Cook. The defendant pleaded non-assumpsit, and a special plea alleging a gaming consideration, upon which issues were taken. On the trial the plaintiff offered in evidence a bill of exchange drawn by G. W. Cook, in favor of Cook & Clark, and accepted by plaintiff in error. Thereupon the plaintiff in error moved for a non-suit, on the grounds of variance. The motion was overruled, exceptions duly taken, and the point brought up to this court.

Assumpsit In *Craig v. Brown*, (Peters C. C. R. 139,) it was alleged on a bill of exchange. The declaration described the bill as being drawn by Elijah Brown could not be given in evidence.

So in *Whitewell v. Bennett*, (3 B. & P. 550,) it was held that a bill signed by one *Crouch*, could not go in evidence under a count describing the bill as signed by *Couch*.

In *Franklin and others v. Talmadge*, (5 J. R. 84,) the plaintiff declared in trespass *quare clausum fregit*, by the name of William Robinson, and the deed under which he claimed title to the *locus in quo*, was to William T. Robinson. Held that the

it was held that the variance was immaterial, the letter T^{SEPT'R TERM} being no part of the plaintiff's name. 1841.

In the declaration now under consideration, the pleader chooses to aver, that George A. Cook drew the bill of exchange sued on *under the name of G. A. Cook*. It was, perhaps, unnecessary to set out the middle name, or initial letter of the middle name at all, but having done so as a description of the instrument, the plaintiff must be bound by such descriptive averment.

The court erred in not ordering a nonsuit.

Judgment reversed and cause remanded.

King
v
Clark.

variance was material. It was, perhaps, unnecessary to set out the middle name, but having done so as a description of the instrument, it became material as a descriptive averment.

FRAZIER & DELLINER V. GIBSON.

1. The word "judgment," in the 4th sec. of the act concerning "Bonds and Notes," (R. C. 1835, p. 115,) was inserted by mistake, the word "assignment" being intended. The maker of a note or bond cannot set off claims against the assignor, accruing after the commencement of suit by the assignee.
- 2 A note transferred by delivery, for a valuable consideration, may be the subject of set-off. The transfer or assignment need not be in writing.

Appeal from the Circuit Court of Franklin county.

Frissel for Appellants.

On the part of the appellants in this cause it is insisted, that the facts of the case bring them within the 3d section of the statute respecting bonds and notes, (Rev. Statutes of 1835, page 104.) which provides "That the nature of the defence of the obligor or maker of a note shall not be changed by the assignment, but he may make the same defence against the bond or note in the hands of the assignee that he might have made against the maker.

Polk for Appellee.

1st. That there was no exception taken by appellants at

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Delliner
v.
Gibson.

2d. The set-off claimed by the appellants could not have been available on a trial before the justice of the peace, on the evidence preserved in the bill of exceptions, and as the same causes of action, and no other, that were tried before the justice shall be tried in the circuit court on an appeal, neither could it have been available in the circuit court.—Statutes of 1835, page 354, sec. 9, and page 371, section 16.

3d. The court below did right in refusing appellant's motion for a new trial. See bill of exceptions.

Opinion of the Court by Scott, Judge.

John Gibson sued Frazier and Delliner in a justice's court on a note executed by them to Elias Gibson, and assigned to John Gibson. A note executed by Elias Gibson to one Jameson, and by him transferred by delivery for a valuable consideration, to Frazier and Delliner, before the assignment of their note by Elias Gibson to John Gibson, was offered in evidence, and rejected by the court below.

The question is, whether the note was properly rejected?

The word "judgment," in the 4th sec. of the act concerning "Bonds and Notes," (R.C. 1835, p. 105,) was inserted by mistake; the word "assignment" being intended. The maker of a note or bond cannot set off claims against the assignor, accruing after the commencement of suit by the assignee.

The statute concerning bonds and notes, sec. 4, says, the obligor or maker shall be allowed every just set-off and discount against the assignee or assignor before judgment. The word *judgment* has found its way in this place by mistake, and the word "*assignment*" was intended; for we cannot suppose that the law designed to give the maker of a note or bond a right to buy up claims against the assignor or assignee after the commencement of his action, and thereby subject him to the payment of costs, when at the time of the institution of his suit there was no defence against his claim. In Kentucky and Virginia where the statutes on the subject of the assignment of bonds and promissory notes similar to our own exist, it has always been held that a set-off arising from other transactions against the assignor, before notice of the assignment, may be given in evidence on an action by the assignee against the maker. 1 Mar. 510; 1 Monroe,

195; 2 Mar. 202; 6 Cranch; 7 Peters, 608. As to the objection that the note was not assigned in writing, and that at law the defendants could not use it as a set-off, it may be observed, that before the statute allowing assignees of choses in action to maintain suits in their own name, courts of law took notice of the person who was really interested, and the beneficial interest vested in the assignee is so far regarded that the defendant is allowed to set off a debt due from the assignee in the same manner as if the action had been brought in his name; and it would not seem necessary that the interest of the cestui que trust should appear in the writ and declaration, it will suffice in any part of the pleadings. This action was commenced before a justice, in whose court there are no pleadings, it will be sufficient that the interest of the defendants in the note appears by the evidence. *Crozer v. Craig*, Washington, 66, 428; 3 Marsh. 351, *Jenkins v. Bush*. Let the judgment be reversed.

SEPT'R TERM,
1841.

Frazier and
Delliner
v.
Gibson.

A note transferred by delivery, for a valuable consideration, may be the subject of set off. The transfer or assignment need not be in writing.

THE BANK OF THE STATE OF MISSOURI v. HULL, impl'd, &c.

In suits on negotiable instruments, a party to the instrument may be permitted to testify if he is not disqualified by interest. The maker of a note is, therefore, a competent witness for the endorser in an action by the endorsee against the endorser, the maker having no interest in that suit, being liable in either event. This is not the case, however, if he is an accommodation endorser, in which case he is regarded as a surety, and if the endorsee succeeds against him, he is entitled to recover of the maker not only the amount of the note, but the cost he has been compelled to pay. Unless, therefore, the maker is released from his liability he is incompetent.

Error to the Court of Common Pleas of St. Louis county.

Bowlin & Woodruff for Plaintiff in error

1st. That the court erred in admitting the evidence of William J. Austin, one of the makers of said several notes, as witness for defence, as he was interested in the direct result of the suit. For the amount of the notes he is alike

SEPT'R TERM, 1841. liable to either party, but to the extent of the costs of this cause he is alone liable to defendant, who introduces him. Gil. Law of Ev., vol. 1, pages 223, 224; Saunders on Pleas, Ev. 2, vol. 2, 443; Easts. Rep. vol. 14, p. 564; Starkie, vol. 2. 751; Chitty on Bills, 655.

Bank of Mo.
v.
Hull.

The only remaining question that arises upon the record in this cause is, was Joseph S. Hull, the defendant, a partner of William C. Hull, at the time of the endorsements of these notes. The proof abundantly shows that he was, and as such was liable; and it was error in the court, sitting as a jury, to give verdict and judgment for defendant.

As to evidence of partnership and what is a dissolution to the world, see Gow on Partnership, 11, 12, 270, 271.

The notices were also proved; but this is not important, as the notorious insolvency of the makers from the maturity of the notes, made the endersers liable under our statute.— See R. C. 105, sec. 9. For sufficiency of notice, see Bank v. Moore, Mo. Rep. vol. 5, p. 379.

The court upon the state of facts preserved in this record, and for the reasons assigned, ought to have granted a new trial; and the refusal to do so on the case presented is error. See Graham on New Trials, 237, 238.

J. Davis & Leslie for Defendants.

The defendant, J. S. Hull, insists that the Bank of State of Missouri stands in the same position that the commercial agency did, from whom she received said notes, as the same are not negotiable notes under the statutes of Missouri.

William C. Hull could not bind his copartner by an accommodation endorsement, without the express or strongly implied assent of the latter, it being a matter out of the ordinary business of the copartnership.

One partner cannot bind his copartner by an endorsement in the partnership name as security for the debt of another, unless the other partner previously or subsequently assent to it. Lavery v. Burr, 1 Wendall, 528; Mercein v. Andrus, 10 Wendall, 461; Foot v. Sabin, 19 Johnson, 154; Bank of Rochester v. Bowen, 1 Wend. 158.

The endorsement of Wm. C. Hull in this case was made, SEPT'R TERM
 as appears from the evidence, to secure a previous debt of 1841.
 Savage and Austin, due the Commercial Agency. Austin, Bank of Mo.
 one of the makers of the notes in question, is a competent v.
 witness for defendant. 3 Wendall, Williams et al. v. Wal- Hall.
 bridge, 415; 7 Term Rep. 591; 5 Cowan, 153.

Austin had no interest in the event of this suit; he admitted his liability as maker of the notes, and is not liable for costs of this action at suit of endorers. Simpson v. Griffin, 9 Johnson, 131; Mass. Rep. 171; Chitty on Bills, 9th Am. ed. 349 and 50, margin; also note in same, page 336, margin, in which note reference is made to Bleaden v. Charles, 7 Bingham, 246; 5 Carr and Payne, 14, s. 6.

Enough appears from the evidence, exclusive of the testimony of Austin, to show that the notes were given to secure a previous debt of Savage & Austin, the makers, and that the endorsements were made by Wm. C. Hull, without the knowledge or assent of his partner, and without any consideration.

It is also contended that a promissory note endorsed by one of the members of a firm for the accommodation of others, makes it incumbent on the plaintiff, if he wishes to hold the firm, to show the consent of those members.

Accommodation endorsements are not within the ordinary business of copartnerships.

Opinion of the Court by Napton, Judge.

The plaintiff in error sued William C. and Joseph S. Hull, in assumpsit, to recover the amount of three promissory notes made by Savage & Austin, and endorsed by defendants. On the trial of the cause, the defendant proposed to swear William J. Austin, one of the firm of Savage & Austin, makers of the notes. To the introduction of this witness objections were made on the ground of incompetency, but the objections were overruled by the court, and the witness testified. From his testimony it appeared that the notes in question were drawn by Savage & Austin, and endorsed by

SEPT'R TERM, 1841. W. C. Hull, for their accommodation merely. The testimony of this witness, together with other evidence, conducted

Bank of Mo. to prove that the endorsement was made by W. C. Hull, without any authority to bind his copartner, Joseph S. Hull.

V.
Hull.

The verdict was for the defendant.

The only material question arising on this record is the competency of W. J. Austin, as a witness for the defendant.

The principle established in *Walton v. Shelly* (1 T.R. 296) that upon reasons of public policy, apart from the question

In suits on negotiable instruments, a party to the instrument may be permitted to testify if he is not disqualified by interest. The maker of a note is, therefore, a competent witness for an endorser in an action by the endorsee against the endorser, the maker having no interest in that suit, being liable in either event. This is not the case, however, if he is an accommodation endorser, in which case he is regarded as a surety, and if the endorsee succeeds against him, he is entitled to recover of the maker not only the amount of the note, but the costs he has been compelled to pay. Unless, therefore, the maker is released from this liability he is incompetent.

permitted to impeach it, has never been adopted by this court. In a majority of the States the later English adjudications on this point have been followed, though in a few States the rule in *Walton v. Shelly* is still adhered to. The better received opinion, both in England and this country, appears to be, that in negotiable instruments a party to the instrument may be permitted to testify if he is not disqualified by interest. The maker of a note is therefore a competent witness for an endorser in an action by the endorsee against him, because he has no interest in that suit, being liable in either event. 4 Taunt, 464. This is not the case, however, if he is an accommodation endorser, in which case the law regards him as a surety, and if the endorsee succeeds against him he is entitled to recover of the maker not only the amount of the note, but the costs he has been compelled to pay. This liability for costs disqualifies him. *Hubby v. Brown*, 16 John. R. 70. The court of common pleas did not err in admitting Austin to testify. He was a competent witness when the objection was made. When the witness disclosed his own incompetency, it was the duty of the plaintiff to object to his testimony, and save his exceptions, if his motion was overruled. Having failed to do so, he cannot after verdict claim a new trial because of incompetent evidence to which he made no objection on the trial. If objections had been made in time, the party may have had it in his power to prove the same fact by other witnesses.—*Wright v. Sharp*, 1 Salk. 288. Judgment affirmed.

MARTIN V. CHAUVIN.

SEPT'R TERM,
1841.Martin
v.
Chauvin.

1. Two or more suits on several demands, each of which is within the jurisdiction of a justice of the peace, but united exceed the jurisdiction of a justice, may be prosecuted at the same time, and cannot be consolidated.
2. When property is to be delivered, or a debt is contracted to be paid in property, on request or demand, and no place is named for the performance of the contract, a special demand at the obligor's residence, is to be averred and proved, and the allegation "*although often requested*," is insufficient. This general rule, however, must be received with some qualification, arising from the nature of the contract, and special circumstances and considerations.
3. Justices of the peace have no jurisdiction in actions on notes exceeding ninety dollars, to be paid in *property*.

Appeal from the Court of Common Pleas of Saint Louis county.

Bowlin for Appellant.

1st. The court erred in overruling appellant's motion for a continuance, upon the affidavit filed. The affidavit sets out a sufficient ground to have warranted the granting of a continuance.

2d. The second point of error relied on is the fact of the courts overruling motion for a nonsuit upon the grounds that the justice had no original jurisdiction in the matter, the notes each being for more than ninety dollars, and not being notes for the direct payment of money, but to be paid in lumber.

3d. The third point relied on is, that the court of common pleas erred in overruling the appellant's motion for a new trial.

The other points made in the assignment of errors not relied on.

J. D. Johnston for Appellee.

1st. As to the first assignment of error, I maintain that Chauvin had a perfect right to sue on the notes separately, as decided by this court in *Barns v. Hol'and*, 3 Mo. Rep. p. 47. And even without the authority of that decision, al-

SEPT'R TERM,
1841.

Martin
v.
Chauvin.

though the law encourages consolidation of actions, where it can be done without prejudice to the plaintiff, it would not in a case like this, compel him to consolidation which would deprive him of the right to a speedy collection of his debt. Had these causes of action been consolidated, they would have amounted to a sum above the jurisdiction of a justice of the peace, and would consequently have driven the plaintiff to the more tardy remedy of process in a court of record. Justices' courts have been established, not more to save the expense incident to proceedings in the higher courts, than to promote the speedy adjustment and collection of debts, and this court it is presumed, will not discountenance that policy.

2d. As to the second assignment of error.—In his affidavit for a continuance, the defendant, not content with stating the materiality of the witness on whose testimony he relied, undertook to specify the fact he expected to establish by him, viz: that several months after maturity of the notes, defendants made a tender of the property for which they called. This was properly held by the court below, to be insufficient ground for a continuance, for even if true, it would be no defence. Had such a tender been made when the notes fell due, it would have been good, but not being made at that time, the debt became a monied demand, and the plaintiff was entitled so to have it.

3d. As to the third assignment of error.—This is sufficiently answered in noticing the first.

4th. As to the fourth assignment of error.—In the bill of exceptions no mention is made of instructions, nor is it remembered that any such absurdity was committed below as asking the court to instruct itself.

5th. As to the fifth and last assignment of error.—The bill of exceptions are a sufficient answer to this.

It was argued below, and may be here, that on notes like these an action does not accrue until after a demand for the specific satisfaction of them.

Reference was made to a Kentucky case, but that only supports the defendant's position so far as having decided a

demand to be necessary where the note was by its terms payable *on demand*, which is not the case with these. SEPT'R TERM,
1841.

Martin
v.
Chauvin.

Opinion of the Court by Scott, Judge.

Chauvin brought two suits, before a justice, against Martin, on two notes, of which the following are copies.

I promise to pay L. J. Chauvin, or order, one hundred dollars, to be paid in pine plank, on or before the 25th day of December, inst., or to be paid with ten per cent interest per annum from this date. Dec. 2, 1838.

ROBERT N. MARTIN.

I promise to pay L. J. Chauvin, or order, one hundred dollars, to be paid in pine plank, on or before the 25th day of December, or to draw ten per cent. interest. For value received. Nov. 29, 1838.

ROBERT N. MARTIN.

Chauvin obtained judgment on both notes in the justice's courts, and the court of common pleas.

The questions arising are, whether the actions should have been consolidated; whether a demand of payment was necessary to be proved, in order to enable the plaintiff to recover; and whether the justice had jurisdiction in actions founded on these notes. As to the first point, the opinion of this court in the case of Barnes v. Holland, 3 vol. Mo. R. 47, settles the doctrine that two or more suits on several demands, each of which is within the jurisdiction of the justice, but the amount of them exceeds it, may be prosecuted at the same time, and that they shall not be consolidated.—As it regards the second point: For reasons which have been heretofore, and still are, deemed satisfactory, this court has adopted the law of Kentucky in expounding contracts of this character. When property is to be delivered, or a debt is to be paid in property, on request or demand, and no place is named, then a special demand at the obligor's residence is to be averred and proved, and the allegation, "although often requested," is insufficient. 2 Bibb, 281, Welmouth v. Petton; Hardin 87. This general rule, as all others, must be received with some qualifications, arising from the nature of the contract, from the debtor not having a *known* Two or more suits on several demands, each of which is within the jurisdiction of a justice of the peace, but united exceed the jurisdiction of a justice, may be prosecuted at the same time, and cannot be consolidated.

When property is to be delivered, or a debt is contracted to be paid in property, on request or demand, and no place is named for the performance of the contract,

SEPT'R TERM,
1841.

Martin
v.
Chauvin.

a special demand at the obligor's residence is to be averred and proved, and the allegation "although of ten requested," is insufficient. This general rule, however, must be received with some qualification, arising from the nature of the contract, and special circumstances and considerations.

Justices of the peace have no jurisdiction in actions on notes exceeding ninety dollars, to be paid in property.

place of residence in the state at the time of the contract; from afterwards changing his place of residence, or from other special circumstances or considerations, which will vary the equity of the rule. Where the time and place are mentioned, or where the time is fixed, and no place mentioned, the law then designates the debtor's residence, as the place for the performance of the contract, and no demand is necessary; but the debtor when sued that on the day and at the place in the contract mentioned, and when no place is mentioned, then at his residence, on the day he was ready and willing to pay or deliver the property according to the contract. *Grant v. Groshen*, Hardin, 85; *Cornelius v. McDonald*, 2 vol. Mo. R. 56.

As to the third point, whether a justice has jurisdiction in an action on a note for one hundred dollars, to be paid in plank; it is not conceived that the third section of the first article of the act concerning justices' courts gives jurisdiction over claims like these in this case. That section says, justices shall have jurisdiction over all actions on bonds and notes for the payment of any sum of money not exceeding one hundred and fifty dollars. The notes in this case cannot be said to be notes for the payment of money; the party might have discharged them in plank; and the plaintiff is only entitled to the money by reason of his having failed to comply with his agreement to pay the plank. The words one hundred dollars, are used, not to show that this is a money demand, but for the purpose of ascertaining the quantity of plank that was to be delivered.

Judgment reversed.

J. & J. GRAHAM V. BRADBURY & SCHAEFFER.

SEPT. TERM,
1841.

1. An attachment cannot be quashed on the ground that the facts do not authorise the issuing of an attachment. If the truth of the facts, on which it is issued is controverted, it must be put in issue by a plea in the nature of a plea in abatement.
2. The remedy by attachment is not confined to resident creditors.

Graham
v.
Bradbury and
Schaeffer.

Error to the St. Louis Circuit Court.

C. D. Drake for Plaintiff.

The reasons assigned by the defendant for quashing the attachment are :

1st. That the claims sued on are debts contracted out of this State, and the affidavit does not show that the debtors, or either of them, absconded or secretly removed their property or effects to this State with intent to defraud, defeat, hinder, or delay their creditors, as required by the statute.

2d. That the plaintiffs and defendants are both non-residents of the state of Missouri, and are both residents of the city of Cincinnati, in the State of Ohio, and as such the affidavit is insufficient, in merely alleging the non-residence of the defendants, to support an attachment in this State.

As to the first reason. The reason is insufficient to quash the attachment, because the ground for obtaining the attachment, laid in the affidavit, is in itself sufficient, without requiring the plaintiffs to set forth also another ground, which the law recognizes as one upon which an attachment may properly issue. The plaintiffs in their affidavit allege the non-residence of the defendants, which is enough for an attachment to issue. The defendants seek to quash the attachment because the plaintiffs do not either go further, and swear that the defendants absconded from Ohio, or take a ground different from that which in the affidavit they saw fit to assume. This proposition by itself would be absurd, but it goes upon the assumption that the debts were contracted out of this State, of which the bill of exceptions shows there was no evidence.

As to the second reason. Here also it is assumed that the plaintiffs are not residents of this State, and therefore cannot sustain an action by attachment against non-residents.

SEPT'R. TERM,
1841.

Graham
v.
Bradbury and
Schaeffer.

There was no evidence of these facts before the court, and even if there was, it is no reason why the attachment should be quashed, as one non-resident may sue another by attachment in this State. Posey v. Buckner, 3 Mo. R. 604.

Opinion of the Court by Scott, Judge.

The plaintiffs in error sued the defendants in error by attachment, in October, 1839. The attachment was sued out on an affidavit, in which it was alleged that the defendants were not residents of, nor residing in this State. The affidavit was made in the State of Ohio, and some nine or ten days before the writ issued. The bond for the attachment was executed in this State, and the note sued on is dated Cincinnati.

On the return of the writ the defendants moved the court to quash it, because the claims sued on were debts contracted out of the State, and the affidavit does not show that the debtors, or either of them absconded, or secretly removed their property or effects to this State, with intent to defraud, defeat, hinder, or delay their creditors; that the plaintiffs and defendants are both non-residents of this State, and are residents of the city of Cincinnati, in the State of Ohio. The court below quashed the attachment, and the cause is brought here by writ of error. The statute of 1839, concerning attachments, prescribes the manner in which defendants shall defeat attachments, when the facts on which they are sued out are false.

An attachment cannot be quashed on the ground that the facts do not authorise the issuing of an attachment. If the truth of the facts on which it is issued is controverted, it must be put in issue by a plea in the nature of a plea in abatement. Section 11, of the act of 1839.

The remedy by attachment is not confined to resident creditors. If the objection to this proceeding could have been taken in the mode adopted by the defendants, yet there was no evidence that the plaintiffs were non-residents. The facts

that the affidavit in Ohio, and the note was dated at Cincinnati, are not sufficient evidence to show that the plaintiffs are non-residents. As to the objection that there was an interval of nine or ten days betwixt the making of the affidavit and the issuing of the writ, the state of the facts might have changed during the interval. The party must take advantage of it by plea; the plea would have put in issue the truth of the affidavit at the time of the issuing of the writ. Some time must necessarily in many cases intervene between the making of the affidavit and the issuing of the writ. Judgment reversed.

SEPT'R TERM,
1841.

Graham
v.
Bradbury and
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DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

SECOND JUDICIAL DISTRICT,

APRIL TERM, 1842.

CRANE V. TAYLOR.

The evidence and proceedings in a cause cannot be reviewed by the Supreme Court, unless they are preserved in a bill of exceptions. (See *Butcher v. Keil & Butcher*, 1 Mo. R. 262; *Davis v. Hays*, ib. 270; *Alexander v. Hayden*, 2 Mo. R. 211; *Bartlett v. Draper*, 3 Mo. R. 487; *County of Boon v. Corlew*, ib. 12; *Foster v. Nowlin*, 4 Mo. R. 18; *Coleman v. McKnight*, ib. 83; *Richardson v. Harrison*, ib. 232; *Davidson v. Peck*, ib. 439; *Swearingen v. Newman*, ib. 456; *Withington v. Young*, ib. 564; *Searcy v. Devine*, ib. 626; *Hughes v. Ellison*, 5 Mo. R. 110; *Pratt v. Rogers*, ib. 51; *Thompson v. Child*, 6 Mo. R. 162; *Gale v. Pearson*, ib. 253; *Magehan v. Orme & Speers*, 7 Mo. R. 4; *Shelton v. Ford & others*, ib. 209; *Benoist & Hackney v. Powell & Wilson*, ib. 224.)

Appeal from the Circuit Court of Benton county.

PHELPS for Defendant in error.

Opinion of the Court delivered by Tompkins, Judge.

Taylor brought his suit against Crane before a justice of the peace and obtained judgment against him. Crane appealed to the circuit court. That court dismissed his appeal; and he appeals to this court. Crane assigns for error, that the circuit court dismissed his appeal. There is no bill of exceptions to show on the record the reasons why the appeal was dismissed, and this court must presume that the cir-

The evidence and proceedings in a cause cannot be re-

APRIL TERM, 1842. cuit court gave a correct judgment, when nothing appears on the record to show the contrary.

Crane
v.
Taylor.

The Judgment of the circuit court is therefore affirmed.

viewed by the supreme court unless they are preserved in a bill of exceptions. (See Butcher v. Keil & Butcher, 1 Mo. R. 262; Davis v. Hays, ib. 270; Alexander v. Hayden, 2 Mo. R. 211; Bartlett v. Draper, 3 Mo. R. 487; County of Boon v. Corlew, ib. 12; Foster v. Nowlin, 4 Mo. R. 18; Coleman v. McKnight, ib. 83; Richardson v. Harrison, ib. 232; Davidson v. Peck, ib. 439, Swearingen v. Newman, ib. 456; Withington v. Young, ib. 564; Searcy v. Devine, ib. 626; Hughes v. Ellison, 5. Mo. R. 110; Pratt v. Rogers, ib. 51; Thompson v. Child, 6 Mo. R. 162; Gale v. Pearson, ib. 253; Magehan v. Orme & Speers, 7. Mo. R. 4; Shelton v. Ford & others, ib. 209; Benoist & Hackney v. Powell & Wilson, ib. 224.)

STATE V. CARROLL—STATE V. SHOEMAKER.

The decisions of this Court in State vs. Heatherly, 4 Mo. R. 478; and State v. Spear, 6 Mo. R. 644, recognised and affirmed.

Opinion of the Court delivered by Napton, Judge.

The decisions of this court in State vs. Heatherly, 4 Mo. R. 478; and State v. Spear, 6 Mo. R. 644, recognised and affirmed. In these cases the defendants below were acquitted by the verdicts of juries, and the State has appealed to this court. In accordance with previous decisions of this court (State v. Heatherly, vol. 4th; State v. Spear, vol. 6, 644,) it is ordered that the appeals be dismissed.

HARRISON V. MARTIN.

The specifications of property exempted from execution in the 15th sec. of the act concerning Executions, (R. S. 1835, p. 265) are cumulative. Therefore, if a mechanic is the head of a family, the statute, in addition to his tools, exempts from execution the same property that is exempt when owned by the head of a family who is not a mechanic.

Appeal from the Circuit Court of Platte county.

THOMAS & DONIPHAN for plaintiff in error.

Opinion of the Court delivered by Scott, Judge.

Harrison instituted an action against Martin in a justice's

court, to recover the value of a horse. On an appeal to APRIL TERM,
the circuit court, a verdict and judgment was rendered **1842**
against Harrison, to reverse which, this writ of error is
prosecuted. Harrison
v.
Martin.

It appears that Harrison was the head of a family, and a mechanic carrying on his trade, and had the tools, and implements necessary for its prosecution; he also owned a horse, whose value did not exceed forty dollars. Martin, who was a constable, had an execution against Harrison, under which he levied on and sold his horse. The question presented for determination is, whether a mechanic, being the head of a family, whilst carrying on his trade, is, in addition to his tools and implements, entitled to retain a horse not exceeding in value forty dollars. The facts stated in the record, do not raise the point on which the judgment of this court is sought. It does not appear but that the judgment on which the execution issued, was for a debt which accrued prior to the act to regulate executions, approved March 20th 1835. The 16th section of that act, limits the operation of the section exempting certain property from execution, to contracts made after the passage of the act. As the question, however, has been argued, and as it may arise again, it is thought advisable to give an opinion upon it.—The manner in which the 15th sec. of the act concerning executions is worded, specifying in numerical order, the things which the head of a family shall hold exempt from execution, there being eight species numbered, and a horse not exceeding in value forty dollars, being amongst the first, and the implements of trade of any mechanic the sixth, shews, that the legislature intended that the things specified as exempt from execution shall be cumulative. If a mechanic is the head of a family, the statute, in addition to his tools, exempts the same property from levy and sale for him, that it would for the head of a family who is not a mechanic. The sparseness of our population in many sections of the State, is such, that mechanics cannot find constant employment at their trade; this compels them to unite the cultivation of the earth with their mechanical pursuits, in order to support their families. And if not protected in the pos-

The specifications of property exempted from execution in the 15th sec. of the act concerning Executions (R.S. 1835, p. 255) are cumulative. Therefore, if a mechanic is the

APRIL TERM. session of the things necessary for that purpose, they would
 1842. abandon their trades altogether, to the great injury of the
 community.

Harrison

v.

Martin.

Judgment affirmed.

head of a family, the statute, in addition to his tools, exempts from execution, the same property that is exempt when owned by the head of a family, who is not a mechanic.

BROWN & OTHERS v. BROWN & OTHERS.

The points relied upon for reversing the judgment of the circuit court not appearing in the bill of exceptions, the judgment is affirmed.

Error to the circuit court of Ray county.

REES, DUNN & WILSON for Plaintiff's.

DONIPHAN & EWING for Defendant's in error.

Opinion of the Court, delivered by Tompkins, Judge.

Both plaintiffs and defendants in this cause, are children of one Henry Brown deceased. Those named as plaintiffs had petitioned the circuit court of Ray county, for a partition of the real estate of the deceased, which consisted of a quarter section of land. One Henry McGee was admitted by the circuit court, as a party to the proceeding, on making and filing his affidavit, that he had acquired an interest in the land which the petitioners were praying the court to cause to be divided. The widow of the deceased had married one Gunnel, and she and her husband had sold to McGee, her right of dower in the land sought to be divided.—The petitioners gave in evidence a writing purporting to be the will of the deceased, by which he gave all his property, both real and personal, to the widow during life, or widowhood, for the purpose of raising his children; and further directed, that in case of her death or marriage, all the effects left should be equally divided among all his children; and

they contended that the claimant of the widows dower, not having shown that the widow made her election to take dower in preference to the provision in the will, as required by the act concerning dower of the year 1835, she must be supposed to abide by the will, and to have renounced her right to dower in the land.

APRIL TERM.
1842.

Brown & others
v.
Brown & others.

The circuit court ordered a partition of the land to be made, and directed that the widow's right of dower should be set apart for the claimant McGee.

The petitioners moved for a new trial, contending that, on a proper construction of the will, the judgment of the court should have been for the petitioners. The court overruled the motion, and the decision of the court on this motion is assigned for error. It no where appears in the bill of exceptions, that the will was proved as required by the statute respecting wills. We are bound to presume in favor of the correctness of the decision of the circuit court; and we are moreover precluded by the bill of exceptions itself, from supposing that the will had been proved, for in the conclusion we find this clause, "*This is all the evidence given in this cause.*" It is useless then to enquire, what would be a proper construction of the will. The judgment of the circuit court is therefore affirmed.

The points
relied upon
for reversing
the judgment
of the circuit
court not ap-
pearing in the
bill of excep-
tions the judg-
ment is affirm-
ed.

MOORE V. AGEE.

Action for a forcible entry and detainer. Plaintiff proved that he had been in possession, and had delivered the same to L. to keep for him, and that afterwards he found defendant in possession, who refused to deliver up the same, and then proposed to prove that defendant had paid L. thirty dollars to deliver possession of the premises to defendant. Held by the court, that this evidence was properly excluded. That there was no evidence on the record of any fraud on the part of defendant, and that, for any thing appearing upon the record, the defendant might have believed that L. was possessed of the premises in his own right.

Appeal from the Circuit Court of Chariton county.

APRIL TERM.
1842.

A. LEONARD for Appellant.

Moore
v.
Agee.

DAVIS for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

Moore brought his action for a forcible entry and detainer before a justice of the peace and there obtained a judgment. Agee, the defendant, appealed to the circuit court, and that court gave judgment in favor of Agee, the defendant in the action, and appellee here. On the trial of the cause before the circuit court, the plaintiff proved that he had been in possession of the land in dispute till the year 1839, and that during that year the defendant occupied it under the plaintiff; that at the end of that year, the defendant refusing to deliver up the possession, suit was brought against him by the plaintiff, and that pending that suit, some time in January, in the year 1840, the defendant delivered to the plaintiff the possession of the premises; that as soon as the plaintiff received the possession, he delivered it over to one Lewis to keep for him, free of rent. The plaintiff then proved that on the 20th day of March, 1840, he went upon the land, and found Agee in the possession thereof; that he demanded possession, and that Agee closed the door of the house standing on the land, and refused to deliver possession, and with a gun in his hand, ordered the plaintiff off. The plaintiff then proposed to produce a witness to prove that shortly after Lewis went into possession, some time in the month of February, it was agreed betwixt the defendant and Lewis that the defendant should pay Lewis thirty dollars, and that Lewis should abandon the possession of the place, in order that the defendant might occupy it; and that the defendant did pay Lewis the said sum of money; that Lewis quit the possession, and that the defendant occupied the premises as soon as they were abandoned by Lewis. The court refused to admit this evidence, the plaintiff suffered a non-suit, and then moved to set aside the non-suit. His motion was overruled by the court, and this act of the court is assigned for error.

In the argument of the cause, the counsel insisted strongly that the contract betwixt Lewis and the defendant was fraudulently contrived by them to deprive the plaintiff, Moore, of the possession. However fraudulently Lewis might have acted, there is no evidence on the record of any fraud on the part of the defendant. For any thing found in the record, he might have believed that Lewis was possessed in his own right, and that Lewis even had the right of property as well as that of possession. The second section of the act concerning forcible entry and detainer is, "That if any person shall enter upon or into any lands, &c. and detain or hold the same with force or a strong hand, &c., every person so offending shall be deemed guilty of a forcible entry and detainer within the meaning of this act."

The 18th section of the same act further provides that "The complainant shall not be compelled to make further proof of the forcible entry or detainer, than that he was lawfully possessed of the premises, and, that the defendant unlawfully entered upon and detained the same."

From this provision of the 18th section it is evident that to make Agee guilty of a forcible detainer against Moore, it was not necessary for him to use his gun, if the right of possession had been in Moore. Indeed, the third section makes a demand in writing, and an omission to deliver possession, a sufficient forcible detainer for the purposes of this action, when the plaintiff has the right of possession. But what right of possession has he shown here? He delivers to Lewis the possession of a lot of land to keep for his use; land, in all probability on which they were each trespassers, that is, land of the United States, and Lewis, as he offered to prove, sold the possession to Agee. It is true, that fraud and collusion was earnestly insisted on in the argument of the cause, but not even offered to be proved. Writers on natural law tell us, that in a state of nature, the first occupant of a spot has a right to exclude all others so long as he remains on that spot. In a state of society a little advanced in civilization, the occupant bestows some labor, and thereby indicates an intention of a more permanent occupancy; then a short absence is not considered an abandon-

APRIL TERM.
1842.

Moore
v.
Agee.

Action for a forcible entry and detainer. Plaintiff proved that he had been in possession, and had delivered the same to L. to keep for him; and that afterwards he found defendant in possession, who refused to deliver up the same, and then proposed to prove that defendant had paid L. thirty dollars to deliver possession of the premises to defendant. Held by the court that this evidence was properly excluded. That there was no evidence on the record of any fraud on the part of defendant, and that, for any thing appearing upon the record, the defendant might have believed that L. was possessed of the premises in his own right.

APRIL TERM.
1842.

Moore
v.
Agee.

ment of his right of occupancy. And this right continues so long as the intention of returning is manifested; and so long others, with no right of property, are held bound to respect his right of possession. But Moore puts on this land an agent to represent him, who sells the right of possession, and Agee, for any thing here shown, or offered to be shown, deals with him in good faith. The circuit court, as it seems to me, very properly excluded the testimony offered by the plaintiff, and its judgment is therefore affirmed.

RENNICK V. WALTON.

A verdict found upon conflicting testimony will not be disturbed by this court.

Appeal from the Circuit Court of Lafayette county.

BURDEN for Appellant

FRENCH & SAWYER for Appellee.

Opinion of the Court, delivered by Napton, Judge.

A verdict found upon conflicting testimony will not be disturbed by this court.

This was an action by petition in debt by William P. Walton against Andrew E. Rennick. Plaintiff obtained a verdict and judgment for nine hundred and sixty-eight dollars and eighty six cents. Plaintiff remitted sixty-five dollars. After verdict, the defendant moved for a new trial, because the court had admitted improper and illegal testimony, and because the verdict was against the weight of testimony. It does not appear from the bill of exceptions that the defendant objected to the testimony when it was offered, and a verdict found upon conflicting testimony will not be disturbed by this court.

Judgment affirmed.

INGRAM v. THE STATE.

APRIL TERM.
1842.

1. The decision of this court in *Johnson v. The State*. (7. Mo. R. 183,) cited and approved.
2. This court will presume that the circuit court decided correctly, unless the contrary appears from the facts and proceedings preserved in the bill of exceptions.

 Ingram
v.
The State.

Appeal from the Circuit Court of Benton county.

WILSON & WINSTON for Appellant.

Opinion of the Court, delivered by Tompkins, Judge.

Ingraham was indicted, and the indictment charges that he wilfully and feloniously did make an assault upon the body of one Lewis Johnson, and did wilfully and feloniously beat, bruise, wound, disfigure, and greatly injure the said Lewis Johnson, &c. The jury found Ingraham guilty in manner and form as charged in the indictment, and assessed against him a fine of forty dollars.

The appellant moved for a new trial, First, because the verdict was contrary to evidence; Second, because the jury has in its verdict assessed the penalty of a misdemeanor, when the indictment alleges only a felony. On the second reason for a new trial it may be observed that at the last term of this court in this district, a similar objection was made against the indictment found against Johnson, and the court then decided that the indictment was good.

A felony under our statute is an offence for which one may be imprisoned in the penitentiary. The offence for which the appellant is now indicted is one that may be punished either by imprisonment in the penitentiary, or fine and imprisonment in the county jail, or by fine alone. See page 184 of the 7th volume of Missouri Decisions.

The decision of this court in *Johnson v. The State*. (7. Mo. R. 183,) cited and approved.

The evidence in the bill of exceptions shows that Josiah Ingraham, a brother of the appellant, on the day this act for which the appellant was indicted was charged to have been committed, frequently abused Lewis Johnson, and challenged him to fight; that the appellant advanced towards Josiah Ingraham and Lewis Johnson, who were engaged fighting,

APRIL TERM.
1842.

Ingram
v.
The State.

This court will presume that the circuit court decided correctly, unless the contrary appears from the facts and proceedings preserved in the bill of exceptions.

seized the arm of Johnson, and held it while Josiah Ingraham bit the finger of Johnson. This finger was afterwards amputated; and in the opinion of the surgeon who performed the operation, the necessity for amputation was produced by the act of biting. It was further proved that before the parties had closed with each other, William Ingraham had reproved his brother Josiah for his improper behavior towards Johnson, and after they were engaged, he had called on the bystanders to aid in parting the combatants.

No instructions are saved in the bill of exceptions, and we are bound to presume that if the circuit court gave any, that they were correctly and properly given. Indeed, if we may be allowed to look into the clerk's history of the case, we find one asked and given for the State, and one for the defendant, and no exception charged by the clerk to have been taken by either. The defendant also moved for a new trial on account of newly discovered evidence, which, from his own statement on the bill of exceptions, appears to have been given to the jury that tried the cause. This being the state of facts, the judgment of the circuit court ought in my opinion to be affirmed, and such being the opinion of the other judges, it is affirmed.

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WILKERSON v. WHITNEY.

APRIL TERM.
1842.Wilkerson
v.
Whitney.

The third section of the act to restrain gaming, (R. C. 1835, p. 291.)

Providing that "all judgments &c., when the consideration is money or property, won at any game or gambling device, shall be void," extends only to judgments by confession; where the judgment was obtained by due process of law, no defence having been made, or an unavailing defence, the judgment cannot be set aside, or vacated by a bill in equity, or on motion.

Appeal from the Circuit Court of Livingston county.

SLACK for Appellant.

CLARK for Appellee.

Opinion of the Court, delivered by Napton, Judge.

This was a bill in chancery, praying an injunction against a judgment at law, obtained upon a note for fifty-six dollars. The bill charges that the note was given for a gaming consideration. The circuit court dismissed the bill, and the only question here is, whether courts of chancery have any power to enjoin a judgment at law, regularly obtained, upon a charge of gaming in the consideration of the obligation on which the judgment was founded.

The act of December 30, 1824, (Rev. Code, '25, p. 410,) declared that all judgments, mortgages, assurances, bonds, notes, bills, specialties, &c., given, granted, drawn, or executed contrary to the provisions of that act, might be set aside and vacated by any court of equity, upon bill filed for that purpose by the person so granting, giving, entering into, or executing the same. The act of March 9, 1835, (Rev. Code of 1835, p. 290,) merely declares, that all judgments, conveyances, bonds, bills, notes, and securities, when the consideration is money or property won at any game or gambling device, shall be void. The act further provides, that any defence under it may be specially pleaded or given in evidence under the general issue.

APRIL TERM.
1842.

Wilkerson
v.
Whitney.

The third section of the act to restrain gaming, (R. C. 1835, p. 291.) Providing that "all judgments, &c., when the consideration is money or property, won at any game or gambling device, shall be void," extends only to judgments by confession; where the judgment was obtained by due process of law, no defence having been made or an unavailing one on motion.

The judgments spoken of in the act of 1825, I understand to be judgments by confession or warrant of attorney.

The words "given, granted, executed, entered into," could hardly be applicable to a judgment upon plea or by default.

And though the act of 1835 has omitted these words, and speaks generally of judgments, bonds, notes, and other assurances, yet it is plain that no other judgments were embraced in its provisions, than judgments by confession. The act was intended to include all *assurances*, from the lowest order of specialties to those of the highest dignity in the eye of the law. To suppose that a judgment obtained by due process of law, where no defence was made, or an unavailing one, could be set aside on motion, or re-examined by a chancellor on allegations of a gaming consideration, would create an anomaly in the law, and conflict with express provisions of our statute, declaring that courts of equity shall not have jurisdiction, when adequate relief can be had at law. The circuit court, in my opinion, did not err in dismissing the bill.

Decree affirmed.

defence, the judgment cannot be set aside or vacated by a bill in equity;

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HUGHES v. GORDON.

APRIL TERM.
1842.

When the security in a note, within the jurisdiction of a justice of the peace, and the payee reside in one county, and the principal debtor resides in another county, the payee, on being served with notice by the security, to commence suit, has his election to sue the security alone, or the principal debtor; and is not compelled to go to a distant county, and sue the principal debtor alone.

Hughes
v.
Gordon.

Appeal from the Clinton Circuit Court.

WOOD for Appellant.

BURNETT & JONES for Appellee.

Opinion of the Court delivered by Napton, Judge.

From the bill of exceptions in this case, it appears, that the appellant Hughes, and one Blickley, were joint obligors in two notes for twenty dollars each, to the appellee Gordon, and that Hughes, as security, gave notice in writing to Gordon, to commence an action against the principal.— Suit was accordingly instituted within less than thirty days after the notice against Hughes and Blickley; but Hughes alone was served with process and judgment given against Hughes alone. Blickley, it appeared, resided at the time of the notice, in Platte county, and Hughes in Clinton county, in which last county the plaintiff Gordon also resided.— Our statute requires the obligee to sue the principal and securities, when notice in writing is given by any one of the securities. In this case, however, as the principal and security lived in different counties, and the amount of the notes was within the jurisdiction of a justice of the peace, it is plain that both Hughes and Blickley could not have been successfully sued. The act for the benefit of securities, was not, I apprehend, under such circumstances, intended to deprive the obligor of his election, and compel him to go

APRIL TERM.
1842.

Hughes
v.
Gordon.

to a distant county and bring a suit against the principal alone. A security can at all time place himself in a condition, to recover against his principal by paying the debt. Judgment affirmed.

I do not concur.

G. TOMPKINS.

FREEMAN & SNOWDEN v. J. B. & P. G. CAMDEN.

1. Defendants executed their note to plaintiffs, describing them in their note, as "surviving partners of J. B. & M. Camden & Co." Held to be a mere *descriptio personarum*, and unnecessary to be inserted in the declaration.
2. A variance between the writ and declaration cannot be reached by a motion to quash the writ. (See *Jones v. Cox*, ante 173.)
3. After the court has given judgment on demurrer, the same matter is never allowed to be urged in arrest of judgment

Appeal from the Carroll Circuit Court.

JONES & RYLAND for Appellants.

EWING for Appellee.

Opinion of the Court, delivered by Scott, Judge.

J. B. & P. G. Camden, the plaintiffs below, sued Freeman & Snowden by petition in debt, on a note executed by them, in which the plaintiffs below are described as surviving partners of J. B. & M. Camden, & co. The plaintiffs below commenced their petition thus, "John B. Camden and Peter G. Camden plaintiffs &c," omitting the description of their persons contained in the body of the note: the writ requires the defendant below, to appear and answer the complaint of John B. & Peter G. Camden, surviving

Defendants
executed their
note to plain-
tiffs, descri-
bing them in
the note, as
"surviving
partners of J.
B. & M. Cam-
den & Co."

partners of J. B. & M. Camden & Co. For this, APRIL TERM.
 a motion was made to quash the writ, because it varied from **1842.**
 the petition; the motion was overruled, and the overruling
 of the motion is one of the errors complained of.

It is not easy to see the variance alleged, but if this mat-
 ter could be tortured into one, it has been held by this court
 that a variance between the writ and declaration, if it could
 be taken advantage of at all, could not be reached by a
 motion to quash. See *Jones v. Cox & Others*, 7 vol.
 Mo. Rep. Another error assigned, is the overruling the
 demurrer, and the refusal to arrest the judgment. The
 reasons shown in arrest of the judgment, were the same as
 those offered in support of the demurrer. After the court
 has deliberately expressed its judgment upon a demurrer,
 the same matter is never allowed to be urged in arrest of
 judgment. The alleged cause of demurrer, was that the
 plaintiffs were described in the body of the instrument sued
 on, as surviving partners of J. B. & M. Camden & Co.,
 and that they declared by the name of John B. Camden
 and Peter G. Camden, omitting the description given them
 by the note. This is the same question presented by the
 motion to quash. This omission is not material. The word
 "Surviving partners of J. B. & M. Camden & Co.," were
 a *descriptio personarum*, which has always been held un-
 necessary to insert in a declaration.

Judgment affirmed.

Freeman &
Snowden

v.
J. B. & P. G.
Camden

Held to be a
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APRIL TERM.
1842.

STATE V. HAMILTON.

State
v.
Hamilton.

- 1 In an indictment for perjury, against a party to a suit, it is necessary to show, by proper averments, that he was sworn under circumstances which authorised his being sworn as a witness in the cause. See R. S. 1835; Title "Justices' Courts," p. 361.)
2. Unnecessary and useless averments in an indictment, may be rejected as surplusage.

Error to the Circuit Court of Platte county.

BURNETT & JONES for the State.

DONIPHAN for Defendant.

Opinion of the Court, delivered by Napton, Judge.

This was an indictment for perjury. The indictment charged, That on, &c., at &c., before one William Bautta, a justice of the peace within and for the county aforesaid, a certain cause between one Thode, adm'r. &c., and one David Hamilton, in which cause the said Thode was plaintiff, and said Hamilton defendant, came on to be tried in due form of law, and was then and there, to wit &c., tried by said justice &c. And upon the trial of said cause, the said David Hamilton, then and there appeared as a witness, and was then and there duly sworn &c., in the usual form. The indictment further averred, that upon this trial, it became a material question whether the said Thomas Young, in his life time, had sold and delivered to said David Hamilton, a certain barrel of whisky, at, and for the price of seventeen dollars and fifty cents; and whether the said Young had sold and delivered, in his life time, a barrel of whisky, at, and for any price whatsoever. And thereupon, the said Hamilton, being so sworn as aforesaid, devising, &c., on the trial, &c., did testify, &c., that the said Thomas Young, deceased, in his life time, had not sold and delivered to him, the said Hamilton, the said barrel of whisky, at, and for the said price of fifteen dollars, nor at any price whatsoever: whereas, in truth, and in fact, the said Young, in his life time, did sell, and deliver to the said Hamilton, the said barrel of whisky, at, and for said price of fifteen

dollars, and so the jurors aforesaid, &c.; the defendant demurred to this indictment, and the court sustained the demurrer; and the only question is, whether the demurrer was properly sustained.

APRIL TERM.
1842.

State
v.
Hamilton.

In the first count of the indictment, it was averred, that the defendant was sworn as a witness *on behalf of himself*: this was omitted, however, in the second count, and it was simply stated that defendant was sworn as a witness, without specifying on whose *behalf*, or at whose instance the oath was taken. As it was the duty of the court to overrule the demurrer, if either count in the indictment were good, it is unnecessary to enquire, whether the statement that the witness testified on behalf of himself, was improperly made or not. Both counts were objectionable in this, that there was no averment that the witness was sworn under circumstances which would authorize him to be sworn. The general rule of law is, that a party cannot be a witness in his own case. There are special circumstances, which, by our Statute, authorise a party to be sworn. These circumstances should have been set forth.

In an indictment for perjury, against a party to a suit, it is necessary to show, by proper averments, that the witness was sworn under circumstances which authorised his being sworn as a witness in the cause. (See R. S., 1835, Title "Justices' Courts," p. 361.)

The counsel for the defendant has also objected to this indictment, that it is repugnant and inconsistent, because it is averred, that on the trial of the suit before the justice, it became material to enquire, whether a certain barrel of whisky had been sold to defendant, for the price of fifteen dollars and fifty cents, and that defendant testified, he had purchased no such barrel of whisky at the price of seventeen dollars. The words "at, and for the price of seventeen dollars and fifty cents," wherever it occurs in this indictment, may be rejected as surplusage: every substantial averment is made out without it, and the charge is consistent without these words. There was, in my opinion, no defect in the indictment in this particular.

Unnecessary and useless averments in an indictment may be rejected as surplusage.

Judgment affirmed.

APRIL TERM.
1842.

ELY v. ELLINGTON.

Ely v.
Ellington.

To entitle a person to a right of pre-emption under the act of Congress for that purpose, he must either be twenty-one years of age, or the head of a family.

Appeal from the Circuit Court of Platte county.

WOOD for Appellant.

DONIPHAN for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

Alpheus Ellington, a minor, by his next friend, instituted his action of forcible entry and detainer before a justice of the peace against Thomas S. Ely. After the party was summoned, the proceedings in the cause were, at the instance of the plaintiff, removed by writ of certiorari into the circuit court. Judgment there was given in the cause against the defendant, and to reverse it, he appeals to this court.

The testimony preserved in the bill of exceptions shows, that in the year 1838, one Grayson purchased the land in dispute from one Butler, and in the spring of the year 1839, he sold the same to Pleasant Ellington, the father of the plaintiff and appellee, who was then living in Clay county; that in the spring and summer of 1839, said Pleasant Ellington made other improvements on said land, and raised a crop there, but never moved on it; that no person ever entered on the land until the last of January, 1841, when the defendant entered on the said land, and built a cabin on the same quarter section, about two or three hundred yards from that of the plaintiff; that the plaintiff was a young man of about eighteen years of age, and had a negro woman living with him, the property of his father, cooking for him; that he sometimes had negro men belonging to his father with him, assisting him in making fences and putting in his crop; that all the other sons of Pleasant Ellington were married, and had left their father, and that the plaintiff had been sometimes at the house of his father since he took

possession of the land in controversy, particularly whilst his father was absent in Kentucky; that there is a log cabin on said land, and seven or eight acres of cleared land; and that it was in the years 1839 and '40 in cultivation; that the clearing is on land of the United States, and the defendant built his cabin in the woods, outside of the plaintiff's enclosure.

APRIL TERM.
1842.

Ely v.
Ellington.

Several witnesses testified to the same facts. Several instructions were asked by the plaintiff and defendant respectively, and given by the court. One, however, asked by the defendant, was refused. It was this, "That if they find from the evidence that the plaintiff, at the time of entry by the defendant on the premises in controversy, was not over the age of nineteen years, and not the head of a family, and that the defendant did not enter into either the house or the field on said land, but made his, the defendant's, entry into wild land, which is property of the United States, they then must find for the defendant."

The act of congress requires the pre-emptioner to be either one and twenty years old, or to be the head of a family. This instruction should then have been given to the jury.

To entitle a person to a right of pre-emption under the act of congress for that purpose, he must either be twenty-one years of age, or the head of a family.

For although a jury, from the evidence given, might well have found the plaintiff to be the head of a family, yet the refusal of this instruction seems to imply that it was not necessary to be proved that he was the head of a family. If we do not regard the plaintiff as one entitled to a pre-emption, and consequently to the possession of a quarter section, the defendant, Ely, could not, by his act of settling near the plaintiff, Ellington, become a trespasser against him. Because then this instruction was not given, the judgment of the circuit court is reversed, and the cause is remanded for further proceedings conformably to this instruction.

APRIL TERM.
1842.

THE STATE V. AUBERRY.

The State
v.
Auberry.

An indictment under the act concerning "Groceries and Dram Shops," (Laws of Mo., Session 1840-1, p. 82,) for keeping a "grocery" without a license, should contain an averment that the liquors sold were "not to be drank at the place of sale." If the liquors were sold to be drank at the place of sale, the vender would be indictable for keeping a "dram shop" without license, without regard to the quantity sold, and could not be indicted for keeping a "grocery."

Appeal from the Linn Circuit Court.

Opinion of the Court, delivered by Napton, Judge.

The grand jury of Linn county indicted the defendant, Auberry, for transgressing the law concerning groceries and dram shops. The indictment charged, "That defendant on, &c., at, &c., did exercise and carry on the business of a grocer without a license for that purpose continuing in force, and that without such license, that the said Auberry did sell spirituous liquors in quantities not less than one quart, to wit, one gallon, &c., to divers persons, &c., against the form of the statute, &c."

On the defendant's motion, this indictment was quashed. The attorney for the State excepted to the opinion of the court on this point, and saved his exceptions by bill.

The only objection suggested to the indictment is, that the pleader should have averred that the liquor sold "was not to be drank at the place of sale." The first section of the act to regulate groceries and dram shops, (Acts of 1840-1, p. 81) provides that any person desirous of selling wine or spirituous liquors in a quantity not less than one quart, and not be drank at the place of sale, shall take out a license to keep a grocery, and any person desirous of selling wine or spirituous liquors in a less quantity than one quart, or to be drank at the place of sale, shall take out a license to keep a dram shop." It will be seen from this section, that the keeper of a grocery is authorised to sell liquors in quantities exceeding a quart, provided they are not to be drank at the place of sale, and a dram shop keeper may sell in quantities under a quart, no matter where drank, or may sell in

An indictment under the act concerning "Groceries & dram-shops," (Laws of Mo. Session 1840-1, p. 82) for keeping a "Grocery" without a license, should contain an averment that the liquors sold were "not to be drank at the place of

any quantity, provided the liquors are drank at his dram shop. APRIL TERM,
1842.

This indictment charges that the defendant sold liquors in quantities not less than a quart, but does not state whether the liquor was drank at the place of sale or not. If the liquor was drank at the place of sale, though the quantity exceeded a quart, the defendant would have been guilty of selling liquors without a dram shop license. But as the indictment charges that defendant sold without a grocery license, it should have negatived the fact, that the liquors were to be drank at the place of sale. In other words, the indictment should have pursued the words of the statute. The judgment of the court was, in my opinion, correct, and should be affirmed.

The State
v.
Auberry.
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could not be indicted for keeping a "grocery."

JOSEPH MASS v. MOSES BROWN.

Where suit is instituted before a justice of the peace, on two notes, both in favor of the same plaintiff, and against the same defendant, and the notes united, do not exceed the jurisdiction of a justice, he has no authority to make two cases of the one cause of action; nor has he any authority to give judgment on the one note, and continue the cause as to the other note.

Error to the Daviess Circuit Court.

STRINGFELLOW for Plaintiff.

Opinion of the Court, delivered by Tompkins, Judge.

Mass sued Brown before a justice of the peace, and obtained a judgment: from this judgment, Brown appealed to the circuit court; and that court deciding in favor of Brown, Mass appealed to this court.

On the trial of the cause in the circuit court, the appellant, Mass, gave in evidence a promissory note, made to

APRIL TERM.
1842.

Mass
v.
Brown.

Where suit is instituted before a justice of the peace on two notes, both in favor of the same plaintiff, and against the same defendant, and the notes united do not exceed the jurisdiction of a justice, he has no authority to make two cases of the one cause of action, nor has he any authority to give judgment on the one note, and continue the cause as to the other note.

him by Brown, the Appellee. Brown introduced as evidence against this note, a transcript from the docket of a justice of the peace, by which it appears, that sometime before the commencement of this action before the justice of the peace, Mass had instituted an action before the same justice on this same note, for \$100, and on another for \$50; that on the day of trial in that cause, the defendant asked, and obtained a separate trial on the note of \$100; and that judgment was given against the plaintiff on the note for \$100; and the cause was continued as to the note for \$50.

On this evidence, the circuit court decided against the claim of Mass, on the note for \$100, and gave judgment for the defendant, Brown.

It seems to me very plain, that when Mass instituted his first suit against Brown, on the two notes for \$100, and for \$50, that the justice had no authority to make two cases of the one action; and consequently that his judgment against the plaintiff, Mass, on the note for \$100, was entirely void, and that the transcript of such judgment, ought not to have been received in evidence by the circuit court. The plaintiff, Mass, could not appeal from a judgment on half of his demands; and Brown must not be permitted to profit by his own wrongful act, and the blunder of the justice.

The judgment of the circuit court is, therefore, reversed, and the cause will be remanded to the circuit court, to be proceeded in agreeably to this opinion.

As the Transcript offered in evidence, showed that no final disposition had been made of the cause, and for ought that appeared, the cause was still pending, the record was improperly admitted in evidence.

W. SCOTT.

WELTON & EDWARDS V. MARTIN.

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Edwards
v.
Martin.

- I. To divert, or obstruct a private water course, is, by the common law, a private nuisance; and although obstructions to private water courses are declared by Statute, (R. S. 1835, title "Mills and mill dams," sect 23, p. 408) public nuisances; yet, that Statute is merely cumulative, and made for the sake of the remedy, and not with a view to alter or affect the remedies afforded by the common law to individuals for such injuries.
2. When a public nuisance causes a special damage to an individual, he has the same remedies for that damage, and none other, which he would have had, if the injury had proceeded from a private nuisance.
3. The jurisdiction of courts of equity, in cases of nuisance, though not often exercised, is undoubted. It is founded on the right to restrain the exercise, or the erection of that, from which irreparable damage to individuals, or great public injury, would ensue. Every diminution in value, however, of the premises, is not a ground for the court to interfere; nor every species of mischief upon which an action on the case might be maintained.
4. A. filed his bill in equity, complaining of obstructions to his mill, caused by the erection of a dam by defendants, which caused the water to flow back, and so to obstruct his mill and machinery, as to render them of little or no value; and praying for an injunction. Held, that the case was not such a one, as would warrant the exercise of the restraining powers of a court of equity, by injunction.

Appeal from the Clay Circuit Court, sitting in Chancery.

FRENCH & DONIPHAN for Appellant.

WOOD & REES for Appellee.

Opinion of the Court, delivered by Scott, Judge.

Martin, the complainant below, filed in March, 1839, his bill against the defendants below, Welton & Edwards, in which he stated, that he is the owner of a tract of land, through which Fishing river runs: that he, at the March term of the Clay circuit court, in 1838, filed his petition for leave to erect a dam on the said stream, to be connected with a grist and saw mill: afterwards, at the July term of the said court, permission was granted to erect his dam: that so soon as permission was obtained, he commenced building his dam, saw, and grist mill: that his dam and

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saw mill were so far completed, as to enable him to work the saw mill; and that the grist mill and other works, will be completed in a few weeks. The bill then charges, that the defendants below, Welton & Edwards, about the first of March, 1838, without the authority of law, erected a dam on the same stream, below the seat of the complainant, which caused the water to flow back, and so to obstruct his mill and machinery, as to render them of little or no value; that the defendants are still at work on their dam and mills connected with it. Prayer, that the defendants may be enjoined, and restrained from further work on said dam so erected; and from further continuing the same, so high as to back the water on the complainant's mills, and that at the final hearing, the defendants may be compelled to pull down and destroy their dam, it being a public nuisance.

The defendants, in their answer, admit that the complainant is owner of the tract of land mentioned in his bill, and did erect, at the time stated, the dam and mills therein described, by the permission of the circuit court of Clay county.— They admit they have built the dam complained of, about a mile and a half below the complainant's; but deny that it causes the water to flow back so as materially to injure the complainant's mill, and allege that it can now do as much work as if the defendants had not erected their dam: they deny that their dam was built without authority of law: that, at the Nov. Term, in 1837, of the Clay circuit court, a petition was filed, praying for leave to erect the same, which was granted at the July term following, and in pursuance thereof, their dam was built: that at the time of filing their said petition, they believed the complainant was not owner of the land, at the point where he erected his dam, but afterwards purchased the same, maliciously designing to deprive them of their mill seat. They admit, that when the mill stream is full, their dam causes the water to back to the complainant's mill, but deny that it does any injury, &c. To this answer, there was a replication, and the cause set for hearing: at the return term of the writ, a motion was made for an injunction, the motion was continued, and it does not appear from the record that it was ever

disposed of. The cause was afterwards heard on the bill, APRIL TERM. 1842.
 answer, exhibit, and depositions of witnesses, when the court below decreed as follows: that the defendants be perpetually enjoined from all other time, continuing said dam in a condition to back the water on the dam, mill, and mill machinery of said complainants; that they be perpetually enjoined from continuing their dam in such a condition, as that the back water therefrom, will be nearer than nine inches of the head of the shoal in said creek, where the state road from Liberty to Richmond crosses the same: that the defendants abate, pull down, and destroy so much of their dam, as causes the water to back beyond the point mentioned on said shoal. That the said defendants, be further perpetually enjoined, from further work on said dam, &c.; from erecting or constructing other, or new dams, or other obstructions in said water course, so as to back the water higher up the said water course than said point on said shoal: and it is further ordered, that if the defendants fail to abate their dam as required then, that the sheriff carry so much of this decree into effect. From this decree, an appeal was taken by the defendants to this court.

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The bill of exceptions not having been signed by the judge who tried this cause, will not be noticed, the court yielding to the motion, to strike the same from the record. This will narrow the case to the single question, whether the bill presents such a state of facts, as warrants the exercise of the preventive justice of a court of chancery.

The counsel for the defendants contended that, by the statute concerning mills, all unauthorized obstructions to water courses, were declared public nuisances, and on the authority of the opinion of Chancellor Kent, in the case of the Attorney General v. The Utica Insurance Company, 2, J. C. R. insist, that as the injury complained of, is a public nuisance, a court of equity has no jurisdiction. It is a plain principle, that the proprietor of land is entitled to the use of a water course which flows through it, and the law gives a remedy for the violation of the right. To divert or obstruct a water course, is, by the common law, a private nuisance; and although obstructions to

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private water
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Statute, (R. S.
1835, title
"mills and
mill dams,"
sect. 23, p.
408,) public
nuisances.
Yet that Sta-
tute is merely
cumulative,
and made for
the sake of the
remedy, and
not with a
view to alter
or affect the
remedies af-
forded by the
common law
to individuals
for such inju-
ries.

When a pub-
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causes a spe-
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an individual,
he has the
same remedies
for that dam-
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The jurisdic-
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though obstructions to private water courses, are declared public nuisances, yet that enactment is merely cumulative, and made for the sake of the remedy, and not with a view to alter or affect the remedies afforded by the common law, to individuals for such injuries. Admitting that the obstruction complained of, could only be regarded as a public nuisance, and consequently removed by proceedings, at the instance of the State; yet the law is clear, that when a public nuisance causes a special damage to an individual, he has the same remedies for that damage, and none other, which he would have had, if the injury had proceeded from a private nuisance, 16, E. 196, Eden on injunctions, 162. This suit was instituted by an individual complaining of a special damage, and is entirely dissimilar to the case of the Attorney General v. The Utica Insurance Company, a proceeding conducted in behalf of the State, by her attorney general, for an alleged injury, affecting the whole State, and not individual rights. Indeed, it may be questioned, whether the doubts entertained by Chancellor Kent, in that case, as to the jurisdiction of a court of chancery, were well founded. Eden on injunction, 162; Story's equity, 202.

Reverting to the main question, whether the bill presents such a state of facts, as will warrant the interference of a court of chancery, by injunction, we are constrained to say, that if the case presented by the bill, would warrant the exercise of the restraining power of a court of chancery, it would be difficult to conceive a nuisance, which would not justify such interposition.

The jurisdiction of courts of equity, in cases of nuisance, though not often exercised, is undoubted. It is founded in the right to restrain the exercise, or the erection of that, from which irreparable damage to individuals, or great public injury, would ensue. Every diminution in value, however, of the premises, is not a ground for the court to interfere, nor every species of mischief upon which an action on the case might be maintained. Chancellor Kent says, "the cases in which chancery has interfered by injunction, to prevent or remove a private nuisance, are those in which

the nuisance has been erected, to the prejudice or annoyance of a right, which the other party had long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law." Lord Hardwick intimated, that to supply a legal decision, the plaintiff must have been in the previous enjoyment of the subject, at least three years, before he would interpose by injunction, in the case of a private nuisance.

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erection of that, from which irreparable damage to individuals, or great public injury, would ensue. Every diminution in value, however, of the premises, is not a ground for the court to interfere, nor every species of mischief upon which an action on the case might be maintained.

Eden, in his valuable work on injunctions, speaking of nuisances, observes, "whatever may be the actual jurisdiction upon this point, it is, however, certain, that courts of equity, are at present, extremely unwilling to interpose without a trial at law; a question, therefore, has always arisen in these cases, whether the court will grant or continue an injunction *till the trial*." "Where the alleged nuisance consists in the exercise of a manufacture, the court upon the same principle upon which it feels so reluctant to restrain the working of mines and collieries, would require the fact of its being a nuisance, to be first clearly established at law." If these are the principles by which a court of equity is governed, in the exercise of its powers in relation to nuisances, it is not easy to see what is contained in the complainant's bill, that would justify its interposition. Here there is no long possession; no irreparable damage; no strong nor mischievous case of pressing necessity, nor establishment of his right by a trial at law, for it cannot be pretended, that the permission granted by the court, to erect the dam on an ex-parte proceeding, as against the defendants, established any right.

There is a view of this matter, derived from the course of the court below, which, in our judgment, is decisive against the complainant: a court of equity only interposes in these matters, when a suitable case is made out by the bill; if a case is clearly made out upon affidavit, it will grant or continue an injunction, until a trial can be had at law.

If the bill is filed merely for an injunction, and no prayer is made for an account, or compensation for damages, and the injunction is not granted by the court to which the bill

A. filed his bill in equity, complaining of obstruc-

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tions to his mill, caused by the erection of a dam by defendants, which caused the water to flow back, and so to obstruct his mill and machinery, as to render them of little or no value, and praying for an injunction. Held, that the case was not such a one as would warrant the exercise of the restraining powers of a court of equity, by injunction.

is addressed, there is an end of the matter. In this case there is no prayer, nor any foundation laid for compensation. The sole object of the party, seems to have been an injunction; the court below never grants it, yet retains the cause, and in effect, although sitting as a court of chancery, tries an action at law between the parties, and then at the final hearing, enters the decree before recited. As the complainant failed to establish his right to equitable protection by means of an injunction, the cause was at an end, and the bill should have been dismissed. The granting of an injunction in the first instance, was indispensably necessary, in order to give the court authority to retain the cause, until the final hearing. *Bailey v. Taylor*, 4, Eng. Con. Chan. R. 329.

The counsel for the complainant, cited and relied upon the case of *Gardner v. The Trustees of the village of Newburgh*, 2, J. C. R. 162, as being in point. In that case the trustees of a village, proceeding under the authority of an act of the legislature, by which they were empowered to supply the village with water, were about to divert an ancient stream, which had immemorially flowed through a farm; the chancellor laying stress upon the fact, that the water had been immemorially enjoyed with the farm; and because the legislature had taken private property for public purposes, without providing a fair compensation, interfered by injunction to restrain the proceedings of the trustees, until a compensation was made for the persons who might be injured by diverting the water. In a subsequent case, *Van Bergen v. Van Bergen*, 3, J. C. R. 282, an application was made for an injunction, under circumstances similar to those stated in the bill now under consideration, the party complaining of the obstructions to his mill, caused by the erection of a dam on the same stream, below, which made the water flow back upon it; the chancellor, although of the opinion that the party had no just cause of complaint against the defendant, yet, after reviewing the authorities, held that the case was not such a one, as would warrant the exercise of the restraining powers of a court of equity, by injunction.

Decree reversed.

SNOWDEN v. McDANIEL.

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v.
McDaniel

The plea of *non est factum*, although not verified by affidavit, is a good plea to an action on a sealed instrument. The omission of the affidavit merely relieves the plaintiff from the necessity of proving the execution of the instrument; all other advantages of which a party can avail himself under that plea, are still open to him. (See *Bates v. Hinton*, 4, Mo. R. 78; *Payne v. Snell*, ib. 238.)

2. When a non-resident commences a suit, without giving security for costs, he may be permitted to file a bond for costs, after a motion is made to dismiss for want of such security. (See *Gov. of Mo. v. Rector*, 1, Mo. R. p. 638; *Posey v. Buckner*, 3, Mo. R. 604.)

Appeal from the Carroll Circuit Court.

JONES & RYLAND for Appellant.

EWING for Appellee.

Opinion of the Court, delivered by Scott, Judge.

McDaniel sued Snowden by petition in debt on a bond; judgment was rendered against Snowden, and he has brought the cause here by appeal. One of the errors assigned, is, that the court overruled the plea of *non est factum*, filed by Snowden. It has been repeatedly held, that the plea of *non est factum*, although not verified by affidavit, is a good plea to an action on a sealed instrument; the omission of the affidavit, merely relieves the plaintiff from the necessity of proving the execution of the instrument: all other advantages, of which a party can avail himself under that plea, are still open to him. The practice of the circuit court, in permitting motions to strike out pleas, to be substituted for demurrers, ought not to be tolerated. It is not conceived on what principle such a practice is founded. In this case, the plea of *non est factum*, was disposed of by motion, and no bill of exceptions having been taken to the action of the court below, according to the practice of this court, the error cannot be examined.

The plea of *non est factum*, although not verified by affidavit, is a good plea to an action on a sealed instrument. The omission of the affidavit, merely relieves the plaintiff from the necessity of proving the execution of the instrument; all other advantages of which a party can avail himself under that plea, are still open to him. (See *Bates v.*

It is, also, assigned for error, that the court below refused to dismiss the suit, because the plaintiff was a non-resident,

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and had not given security for costs before commencing his suit. The court permitted a bond for costs, to be filed after the motion to dismiss was made, and then overruled the motion. It has been determined by this court, that when a non-resident commences a suit without giving security for costs, he may be permitted to file a bond for costs after a motion is made. Posey v. Buckner, 3d. vol. Mo. R. 604.

Snowden
v.
McDaniel.
Hinton, 4 Mo.
R. 78; Payne
v. Snell, ib.
234.)

Judgment affirmed.

When a non-resident commences a suit without giving security for costs, he may be permitted to file a bond for costs, after a motion is made to dismiss for want of such security. (See Gov. of Mo. v. Rector, 1, Mo R. p. 638.) Posey v. Buckner, 3, Mo. R. 604.)

FROST V. PRYOR.

1. Where the declaration is defective in the omission of an averment without proving which the jury ought not to have found a verdict for the plaintiff, such defect is cured by verdict, and therefore cannot be taken advantage of by motion in arrest of judgment.
2. The plaintiff, as a condition precedent, agreed to make to defendants a good title to certain premises. One of the deeds in the plaintiff's chain of title, was a conveyance of the premises in question by H. and his wife, acknowledged before a *justice of the peace*. H. had no interest in the premises except in right of his wife. Held, that the deed thus acknowledged was incompetent to affect the right of the wife, and conveyed no title to the premises.

Appeal from the Clay Circuit Court.

REES & WILSON for Appellants.

DONIPHAN & WOOD for Appellees.

Opinion of the Court, delivered by Napton, Judge.

The appellee brought an action of assumpsit against the appellant, in the Clay circuit court, on the following note:

"We, or either of us, promise to pay to George M. Pryor, the just and full sum of one thousand eight hundred and six dollars and twenty-five cents, bearing ten per cent. interest from the date until paid, and to be paid within one month

from the time the said Pryor shall perfect his title to the ta-^{APRIL TERM,}
vern lots and property attached thereto. Given under our 1842
hands this 29th day of April, A. D. 1840.

P. S. FROST.

J. P. FROST,

ISAAC FROST."

Frost
v.
Pryor.

On the trial of the cause, the plaintiff below, to show title, offered in evidence several conveyances, to all of which conveyances defendant objected generally, but the objections were overruled by the court. Among other deeds offered and read in evidence, were a patent from the United States to one John Owens, deeds from Owens and wife to one Searcy, deeds from Searcy and wife to one Poter Fleming, deeds from Poter Fleming and wife to John Chauncy, a power of attorney from said Chauncy to G. L. Hughes, and a deed from Hughes to the legatees of G. W. Hendly. The plaintiff also offered a deed from Peter B. Grant and wife (the latter being one of the legatees of said Hendly,) acknowledged before a justice of the peace, and deeds from the other legatees to Pryor, and from Pryor to Frost.

Some oral testimony was introduced, though objected to, for the purpose of identifying the lots described in Chauncy's power of attorney. Several witnesses testified in relation to conversations had with Frost, conducing to show that Frost was advised of the nature of the title, had examined the same, and objected only to the power of attorney.

A verdict was found for the plaintiffs, and judgment given accordingly. Motions were made in arrest of judgment and for a new trial, but the motions were overruled.

The errors assigned are, that the declaration was defective, containing no averment that Pryor had given notice to Frost of his title when perfected, that the court admitted incompetent testimony, and that a new trial was improperly refused.

The declaration is clearly defective; but as the defect consisted of an omission of an averment, without proving which the jury ought not to have found a verdict, it cannot be taken advantage of by motion in arrest. The title papers are spread upon the record by bill of exceptions. It seems that

Where the declaration is defective in the omission of an averment, without proving which

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the jury ought not to have found a verdict for the plaintiff, such defect is cured by verdict, and, therefore, cannot be taken advantage of, by motion in arrest of judgment.

The plaintiff, as a condition precedent, agreed to make to defendants, a good title to certain premises. One of the deeds, in the plaintiff's chain of title, was a conveyance of the premises in question by H. and his wife, acknowledged before a justice of the peace. H. had no interest in the premises except in right of his wife. Held, that the deed thus acknowledged, was incompetent to affect the right of the wife, and conveyed no title to the premises.

the objections made to each of these papers, were general; no specific objection was pointed out to the court below, nor do the grounds of objection taken in the circuit court appear on the bill of exceptions. It is apparent that these general and sweeping objections to the introduction of a mass of testimony, either oral or written, do not present the points which may have been determined in the circuit court, and it may become a question whether this court will be authorised to look into such exceptions, whilst our statutes declare that this court shall review only such matters as have been expressly decided by the court below. In this case, however, the deed from Grant and wife to Pryor was a link in the chain of title, which was clearly defective. The deed was acknowledged before a justice of the peace, and purporting to convey an interest in land to which the husband had no claim except by right of his wife, was incompetent to affect the rights of the wife. It appears plain, then, from the bill of exceptions, without going into an examination of its details, that no title was shown in Pryor, even at the trial, much less then could it be presumed that the title was perfected before the institution of the suit; a condition precedent to the plaintiff's right of recovery. Let the judgment therefore be reversed and the cause remanded.

As all the evidence given on the trial of this cause is preserved in the bill of exceptions, and as it appears from that evidence that no notice was given of the perfecting of the title, and as indeed the party appears to have been unable to give the notice, for his title had not been perfected, it cannot be presumed that notice was proved on the trial. This case is unlike those in which an appellate court is required to arrest the judgment from an examination of the declaration alone, unaccompanied by a bill of exceptions preserving the evidence.

W. Scott.

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THE STATE v. KIBBY and others.

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Where several felonies are joined in the same indictment, the court will compel the prosecutor to elect on which one he will proceed, but not where misdemeanors are thus joined.

The State
v.
Kibby & others.

Error to the Circuit Court of Andrew county.

BURNETT & JONES for the State.

Opinion of the Court, delivered by Scott, Judge.

An indictment was found against Kibby and others, containing two counts, one charging them with acting as grocers, without license, and the other with keeping a dram-shop, without license. On the trial, the circuit court compelled the circuit attorney to elect on which count he would proceed. This was objected to, and is the error assigned. The joinder of several offences in the same indictment in different counts, is no cause of demurrer, or arrest of judgment. But in such cases, when the crimes alleged are felonies the court will compel the prosecutor to elect on which one he will proceed. This, however, is never done where the indictment is for misdemeanors. *Storrs v. State*, 3 vol. Mo. Rep.

Where several felonies are joined in the same indictment, the court will compel the prosecutor to elect on

which one he will proceed, but not where misdemeanors are thus joined.

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STOTHARD V. AULL & MOREHEAD.

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- Stothard
v.
Aull & More-
head.
1. An agent is a competent witness to prove contracts made by him, on the part of his principal.
 2. An authority to purchase articles on credit, must imply a power in the agent, to acknowledge indebtedness in the name of the principal. A recognition, by the principal, of the agency, in the particular instance, or in similar instances, is evidence of the authority of the agent.

Appeal from the Clay Circuit Court.

GREENOUGH for Appellant.

WILSON & REES for Appellee.

Opinion of the Court, delivered by Scott, Judge.

This was an action commenced by appellees against the appellant in a justice's court on a promissory note, executed by one Clarke, for the appellant. On an appeal to the circuit court the appellees had judgment, to reverse which, this appeal has been taken. It appears that Clarke, who executed the note for the appellant, kept a grocery for him; that the business was carried on *in* his, Clarke's, name, but that the concern belonged entirely to the appellant; that Clarke was authorised to buy such things as were wanted for the grocery; that he purchased of the appellees a stove, barrel of whisky, and other articles, which were needed in the grocery, for which he executed the promissory note on which this suit was brought; that Stothard, the appellee, received the proceeds arising from the sale of the articles purchased; that in the course of his employment for the appellee, Clarke had given two other notes in the appellee's name, which had been discharged by him; Clarke had no special authority to execute the notes.

The facts above stated were proved by Clarke himself, and the opinion of the court in permitting him to testify as a witness was excepted to, and is now complained of as error. It is the constant practice to admit agents to be witnesses for their principals in order to prove contracts made by them on the part of the principal, and this is allowed from necessity, or rather for the sake of trade, and the common

An agent is
a competent
witness to

usage of business. If the agent exceeds his authority, he is liable at all events to the losing party, and if he does not, he would be liable to neither. The court below instructed the jury that if they believed from the evidence that the appellee authorised Clarke to purchase the articles for which the note was given on credit, that such authority warranted the agent in signing the note sued on, in the name of the appellee. That the appellee having paid similar notes is evidence of an authority to execute the note now in question. These instructions were objected to, and the giving them is assigned for error. An authority to purchase articles on credit must imply a power to acknowledge an indebtedness in the name of the person for whom they are bought. A recognition by the principal of the agency, in the particular instance, or in similar instances, is evidence of the authority of his agent. As when one signs policies in the name of another who, when a loss occurs, pays the same, this would be evidence of a general authority to sign, policies. So in case the defendant's son had in several instances signed bills of exchange by the direction of his father, it was held sufficient evidence to presume an authority from the father to the son to execute a guarantee. 2 Starkie on Evidence, 33.

Judgment affirmed.

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ASHBY v. GLASGOW, and others.

Ashby
v. Glasgow
& others.

1. When final judgment is rendered in a cause, and that judgment is erroneous, it may, during the term at which it was rendered, be set aside; but when the term is past the control of the court ceases, and no alteration or amendment can be made, but such as is authorised by the statutes of jeofails or amendments.
2. Where a suit, properly cognizable before a justice of the peace, is commenced in the circuit court, judgment for costs should be rendered against the plaintiff.

Error to the Circuit Court of Livingston county.

Opinion of the Court, delivered by Scott, Judge.

Glasgow, and others, sued Ashby by petition in debt, on a note for seventy-four dollars and fifty-seven cents; judgment was recovered for the amount of the note, with damages and costs. At a subsequent term of the court, a motion was made to set aside the judgment for costs entered against the defendant below, which motion was overruled. This is the error assigned, for which a reversal of the judgment is sought.

When a final judgment is rendered in a cause, and that judgment is erroneous, it may, during the term at which it was rendered, be set aside for during a term all the proceedings are in the breast of the court, and they may be altered or vacated as justice requires. But when the term is past, then the control of the court ceases, and no alteration or amendment can be made, but such as is authorised by the statute of jeofails and amendments. An error in the court, in rendering judgment, is not cured by the statute of jeofails, it can only be corrected by appeal, or writ of error. But as the whole record is now before the court, and as it appears that this cause was properly cognizable, before a justice of the peace, the suit having been commenced before the act, amendatory of the act, regulating justices courts, approved February 16th, 1841, judgment for costs should have been entered against the plaintiff below. See 4th sec.

1st article of the act concerning justices' courts, 346. The judgment of the circuit court, as to costs, is reversed, with directions to enter a judgment for costs against the plaintiff, and the cause remanded.

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1842.

Ashby
v. Glasgow
& others.

Where a suit, properly cognizable before a justice of the peace, is commenced in the circuit court, judgment for costs should be rendered against the plaintiff.

THE STATE v. HURT—STATE v. SIGHTS.

Petty larceny is a trespass, within the meaning of the 22d sec. of 3d. art. of the act concerning practice and proceedings in criminal cases, (R. S. 1835, p. 451,) and the name of a prosecutor must be endorsed on the indictment

Scott, Judge, dissenting.

1. Appeal from the Linn Circuit Court.

2. Error to the Linn Circuit Court.

STRINGFELLOW for the State.

JONES for Appellee.

Opinion of the Court, delivered by Napton, Judge.

These cases are similar. In each case, there were indictments for petty larceny, and endorsed by prosecutors, and the only question is, whether such endorsement was necessary or proper.

To determine this question, the simple inquiry must be, whether larceny is a *trespass, not amounting to felony*? To call larceny a trespass, I must admit, is abhorrent to all notions of the offence derived from the common law; yet our statute expressly declares it is not a felony. By the common law, every larceny included a trespass, but the trespass was merged in the felony; can this be so under our statute,

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when the act in terms, declares it to be no felony? and when the word feloniously seems to be purposely omitted in defining the offence?

Our statute was not designed to alter the nature of the offence; the *animo furandi* must still be charged and proved; but our statutory definition of felony, was intended to form a standard to regulate the amount of punishment, and fix the liability of prosecutors.

Petty larceny is a trespass, within the meaning of the 22d sec. of 3d art., of the act concerning practice and proceedings in criminal cases, (R. S. 1835, and p. 481.) the name of a prosecutor must be endorsed on the indictment.

It is to be observed, that under our statute, the word felony, in no instance means a common law felony; it is no more to be understood in that sense, in the act fixing the liability of prosecutors, than when used in any other part of the criminal code. When, therefore, the act declares, that a prosecutor's name shall be endorsed on every indictment for a trespass, not amounting to a felony, we cannot exclude from its operation a trespass, which amounted to a felony at common law, but which does not amount to a felony under the act. The judgment for costs against Linn county, should be reversed, and judgment entered against the prosecutor.

Opinion of Scott, Judge.

An indictment against John Sights, for petty larceny, was preferred to the grand jury of Linn county, on which the name of Mordecai Lane was endorsed as prosecutor: the grand jury returned the indictment "Not a true bill," thereupon, a motion was made to enter a judgment for costs against Lane, which was overruled by the court. This is the error assigned. The 22d sec. of the 3d art., of the act to regulate the practice and proceedings in criminal cases, declares, that "No indictment for any trespass against the person or property of another, not amounting to felony, shall be preferred, unless the name of a prosecutor, as such, is endorsed thereon:" the 24th sec. of the same article, enacts, "That if any indictment so endorsed, shall be returned by the grand jury, "Not a true bill," the prosecutor shall be adjudged to pay the costs. It is contended on the part of the State, that, as by statute, petty larceny is no longer a felony, that, therefore, it is a trespass not amount-

ing to felony, and within the meaning of the above recited act. APRIL TERM. 1842.

It is evident that every larceny includes a trespass, but it is something more than a trespass. In prosecutions for larceny, no defence is more common than that the taking was a bare trespass, and not a larceny. Although by our statute, petty larceny is no longer a felony, yet it will not be pretended, that the same ingredients are not necessary to constitute the offence, and that in prosecutions for it, the same evidence must be produced, which was requisite to a conviction before the offence was declared not to be a felony.

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The *animo furandi* is still necessary to constitute petty larceny, and whenever the taking is *animo furandi* it ceases to be a trespass, and becomes a mere heinous offence. If the legislature should make murder punishable by fine and imprisonment in the county jail, would that, in cases where the death was caused by force, make the crime a mere trespass? A reference to the last sections of the 3d article, of the act concerning crimes and punishments, will show many instances of trespasses, not amounting to felony, which are amply sufficient to satisfy the words of the law, without by a forced construction, which changes the nature of offences, extending its operation to crimes which were never intended to be included in its provisions.

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BERRY V. DRYDEN.

Berry
v.
Dryden.

1. In slander, although the words proved are equivalent to the words charged in the declaration, yet not being the same in substance, an action cannot be maintained; and although the same idea is conveyed in the words charged, and those proved, yet if they are not substantially the same words, though they contain the same charge, but in a different phraseology, the plaintiff is not entitled to recover.
2. Quaere. Whether a court can instruct a jury as to the weight and tendency of evidence?

Error to the Daviess Circuit Court.

Opinion of the Court, delivered by Scott, Judge.

Francis Berry brought an action of slander against William Dryden. The declaration contained four counts, of which the plaintiff relied on the first two. In these, the words charged to have been spoken, were the following: "He, (meaning the plaintiff,) had sworn a lie in Kentucky, and that it was in him, for he had sworn what he could prove to be a point blank lie, this day, before Squire Davis. He, (meaning the plaintiff,) had sworn a lie in Kentucky, and that it was in him, for he had sworn what he could prove to be a point blank lie, this day, before Squire Davis."

On the trial it was proved that the defendant had said of the plaintiff, that he had sworn off a just account, before Squire Davis, and that he would, or could prove it, at the circuit court by a witness; that he had been had up for perjury in Kentucky, and the records would show it.

The defendant's counsel moved the court to instruct the jury, that the words laid in the declaration were not supported by the proof. This instruction was given and accepted to, and is now assigned for error.

The plaintiff has made a preliminary objection to the instruction, and insists, that it is the province of the jury and not of the court, to determine whether there is such an identity between the words proved, and those laid in the declaration, as will support the action. This position cannot be maintained. Whether a variance exists or not, between the declaration and proof, is a question exclusively for the de-

termination of the court. The jury ascertains what words were spoken, and if there is a variance between them and the words contained in the declaration, will look to the opinion of the court, in order to be informed, whether it is of such a nature as will defeat the action.

After the many decisions that have been made on the subject of variance, in actions of slander, no authority will be required, to show that the words proved to have been spoken, are not substantially the same as those laid in the declaration. The rule is stated in the books, that the slander proved must substantially correspond with that charged in the declaration. By this, it is not to be understood, that if certain words are employed to convey a slanderous imputation, those words will support a declaration containing the same imputation in different words. The meaning of the rule seems to be, that, if the words charged to have been spoken are proved, but with the omission, or addition of others not at all varying, or affecting their sense, the variance will not be regarded. Although the words proved are equivalent to the words charged in the declaration, yet not being the same in substance, an action cannot be maintained; and although the same idea is conveyed in the words charged and those proved, yet if they are not substantially the same words, though they contain the same charge, but in different phraseology, the plaintiff is not entitled to recover. In *Maitland v. Goldney*, 2 East 438, it is said, "Though the plaintiff need not prove all the words laid, yet he must prove so much of them, as is sufficient to sustain his cause of action, and it is not enough for him to prove equivalent words of slander." It is necessary that this rule be adhered to, in order to let the party know what he has to defend, and that he may not be held responsible for the misunderstanding of the witnesses, as he might, if they were permitted to testify as to the import of his words. 2 Phil. Evidence, 97.

It is also assigned for error, that the court instructed the jury, that there was no evidence that the plaintiff was sworn before the justice. This objection is well taken. There were circumstances, from which a jury might have inferred,

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Quaere. Whether a court can instruct a jury as to the weight and tendency of evidence.

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that the plaintiff was sworn, and it was their province to weigh them. The slander itself, admitted that the party was sworn. Without giving a settled opinion on the subject, it may well be doubted, whether a court is warranted in giving such an instruction in any case. What is, or is not evidence, is a question of law for the determination of the court. The weight and tendency of that evidence, must be ascertained by the jury. When a particular mode or form of proof is required by law, to establish a fact, the court will determine whether the law has been complied with, and will reject, or admit the evidence accordingly; but whether a fact requiring no formal proof, and whose existence may be inferred from the other facts and circumstances in the cause, has been proved or not, is a question for the jury to determine, and not the court. Jurors are presumed competent to discharge the duty assigned them, in the administration of justice, and they will know whether any evidence tending to establish a fact has been produced or not—they need not be informed of it, and the court cannot instruct them as to the tendency of evidence, without usurping their province. Can it be error for the court to refuse such an instruction? Suppose a fact in evidence, in the opinion of the jury, tends to the proof of another fact, is it for the court to tell the jury, that such fact has no such tendency?

As the plaintiff upon the whole record has shown, that he is not entitled to recover, notwithstanding this error, the judgment will be affirmed.

DECISIONS
OF THE
SUPREME COURT OF MISSOURI.
FOURTH JUDICIAL DISTRICT,
MAY TERM, 1842.

DESLOGE & ROZIER v. RANGER, Ex.

In determining whether a contract was a conditional sale or a mortgage, in cases where the form of the instrument is not conclusive either way, resort must be had to the circumstances attending the transaction: And if, upon a full view of the whole matter, doubts may be reasonably entertained as to the real intent of the parties, courts of equity have inclined to regard the transaction as a mortgage.

Appeal from the Circuit Court of Washington county.

SCOTT & FRISSEL for Appellants.

BRICKEY & COLE for Appellee.

Opinion of the Court, delivered by Napton, Judge.

This was a bill in chancery brought by Marie T. Ranger, executrix of Lambert Ranger, deceased, for the redemption of a negro girl, conveyed to Desloge & Rozier in 1830. The instrument of conveyance was as follows: "Know all men by these presents, that I, Lambert Ranger, of the county of

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Washington, and State of Missouri, this twenty-first day of August, in the year of our Lord one thousand eight hundred and thirty, for and in consideration of the sum of two hundred (\$200.00) dollars, lawful money of the United States, the receipt of which I hereby acknowledge, have bargained, sold, and transferred, and by these presents do bargain, sell, and transfer a certain young negro girl named Marie Louise, warranted sound in her body, unto Firman Desloge and Ferdinand Rozier, their heirs or assigns. And by these presents warrant and defend against all claim whatever the right and title to said negro girl. It is, however, understood between the parties, that the said Ranger, his heirs or assigns, can at any time within the space of two years, redeem the said negro girl, by paying and refunding unto the said Desloge & Rozier the above sum of two hundred (\$200.00) dollars, together with the legal interest from the date above mentioned.

his
LAMERT X RANGER,
mark.

In the presence of
JACOB BOAS,
BAZIL MISPLAY.

It appears from the bill and answer, as well as the testimony of witnesses, that in the summer of 1830, Lambert Ranger was indebted to the firm of Desloge & Rozier in the sum of two hundred dollars; that Ranger being confined to his house by illness, from which he never recovered, was called upon by Desloge, the acting partner of the firm, to settle his account, but being unable to do so, executed the above instrument of writing. The answer of Desloge avers that the negro girl was delivered up to him immediately on the execution of the instrument, but that from her tender age he offered to leave her with the complainant, and did so leave her.

The witnesses say nothing of any delivery, but state their impression to have been, that the girl was to remain in possession of Ranger for two years. One witness states that she was present at the sale, and that Desloge said to Ran-

ger, that the girl might stay two years, and if the money was not paid, he would take her away. Ranger died shortly after the sale.

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Before the expiration of the two years, Desloge called upon the complainant, and stating that he had need of the services of the girl, in consequence of the illness of his own house servants, requested her to be sent to his house, with a promise that he would return her so soon as his servants should recover. The girl was sent, but was never afterwards in possession of the complainant.

About the expiration of the two years allowed for redemption, Desloge, at the request of Marie T. Ranger, the widow of Lambert Ranger, consented that she might have six months longer to redeem the negro; but she was still unable to do so; and in the year 1835 the negro was sold by Desloge for eight hundred dollars.

There was proof that the two hundred dollars, with interest, had been on one or two occasions tendered to Desloge, but refused. But no proof of any tender until after the expiration of the two years and six months allowed for redemption, by the instrument of writing, and the subsequent parol agreement of Desloge.

It was also in proof that two hundred dollars was a fair price for negroes of the description of the one sold, at the time of the transfer to Desloge & Rozier.

The court decreed that defendants retain \$200.00, their debt, and interest for two years, and pay the complainant the balance, amounting to \$576, with interest from 13th December, 1836, the date of the writ.

The only inquiry presented by the record is, whether the contract in this case was a security for the repayment of money, or an actual sale. Courts of equity have never denied to parties the power of making contracts for conditional sales, and if the form of the instrument, together with the extrinsic circumstances attending the contract, are conclusive of the intention of the parties, it is not their province to interfere. When the form of the instrument is not conclusive either way, resort must be had to the circumstances attending the transaction. And if, upon a full view of the

In determining whether a contract was a conditional sale or a mortgage, in cases where the form of the instrument is

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whole matter, doubts may be reasonably entertained as to the real intent of the parties, courts of equity have inclined to regard the transaction a mortgage. By this rule of interpretation, no injustice is done to the creditor, as he receives his debt and interest, which it was his purpose to secure.

In this case the instrument contains a clause of redemption, and is so far a mortgage. It does not, however, contain any obligation for the repayment of the money, and in that particular, lacks one of the most important features of a mortgage. A remedy against the person of the debtor is essential to a mortgage; but, as was observed by Judge Marshall, in *Conway's Exr. v. Alexander*, (7 Cranch, 218,) if this remedy really exists, its not being reserved in terms, does not affect the case. Whether any remedy existed in this case, then, must depend upon the construction to be given to the instrument from extrinsic circumstances, for if the instrument should appear from such circumstances to have been designed as a mortgage, the debt was not merged in the contract of sale, and the creditor had his remedy against the mortgagor, either by foreclosure, or suit upon the original contract. If the instrument was in form and essence a sale, the debt was paid, and no remedy existed against the person of Ranger, and the death of the slave would have been the loss of the purchaser.

The form of this instrument, then, I take not to be conclusive, and we therefore resort to the circumstances attending the transaction, for the purpose of ascertaining the real intention of the parties. In the case of *Chapman v. Terrell*, (1 Call 280,) a leading case on this subject, Judge Pendleton said "The great desideratum which this court has made the ground of their decisions is, whether the purpose of the parties was to treat of a purchase; the value of the commodity contemplated, and the price fixed; or whether the object was the loan of money, and a security or pledge for the repayment, intended." The intention of the parties must then govern the construction of this contract.

In fixing on the marks by which conditional sales are to be distinguished from mortgages, I have seen no case in

which the characteristics of each, are more clearly pointed out, than they have been by Judge Heyward, in the case of *Bennett v. Holt*, (2 Yergus' Rep.) His language is this, "Is there a striking disparity in value, between the property conveyed, and the money advanced? It is, then, undoubtedly, intended as a security. Is there no price fixed? It is then, probably, not a sale, but a security only; for had a sale been contemplated, the price would have been agreed on. Is there a covenant for repaying the money? If so, it is most probably a mortgage, for repayment is incompatible with a sale. Does possession remain in the maker? This circumstance repels the idea of a sale; for the vendee, in case of a sale, would take possession. But if the price be settled, and there be not any great disparity between the money advanced, and the thing conveyed; if the receiver of the money be not bound to repay it, and there is no covenant to that effect; and if the possession is delivered to the vendee, then it is a sale, and being liable to be defeated, by paying a certain sum on a certain day, it is a conditional sale."

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Let us examine the circumstances of the present case upon these principles. Here the price was settled, and the price a fair one, and there was no covenant for repaying the money. Thus far, the transaction was clearly a sale. But the possession of the negro, remained in Ranger, which fact, according to Judge Heyward, *repels the idea of a sale*. It is true, that Desloge, in his answer, avers that the slave was duly delivered to him; but without questioning this statement, which is unsupported by the testimony, it is obvious, that this delivery, if it did take place, was purely formal. The proof is clear, and uncontradicted, that the girl remained in Ranger's house for two years after the sale, and was only got into the possession of Desloge, by the permission of the widow. I am not prepared to say, as Judge Heyward intimates his opinion to be, that this circumstance is absolutely conclusive against the vendee or mortgagee, and could not be explained; but it is, in my opinion, entitled to great weight in explaining the intent, and understanding of the parties, and is well calculated to throw doubt and uncer-

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tainty on a transaction, which otherwise might be clearly a conditional sale. Thompson v. Davenport, 1 Wark, 127.

Ex. There is an other circumstance entitled to consideration, in determining the real nature of this transaction. A pre-existing debt is alluded to by Judge Marshall, in the case of Conway's Ex. v. Alexander, as affording presumptive proof, that a mortgage is designed. In this case, Desloge and Rozier were not traders in negroes, nor from any thing that appears, had they any wish to purchase such property.— They were merchants, and it is clear, that from the friendly feeling they entertained for the family of the Rangers, which they repeatedly aver in their answer,) they had no other wish or design, than to secure the debt which Ranger owed them. The instrument of sale was, therefore, made to Desloge & Rozier, a mercantile firm—not dealing in the purchase and sale of slaves, and the slave sold, was a family servant, and one, therefore, which Ranger would not have parted with, except from his necessitous circumstances, and which he did not part with, except upon express conditions, that he might redeem within a given time.

Upon the whole, it appears to me, that the retention of the possession by Ranger—the existence of a previous debt on his part, and the execution of the instrument to a *mercantile firm*, were circumstances calculated at least, to throw so much doubt over the transaction, as to justify a court of equity in construing it a mortgage.

Decree affirmed.

Tompkins Judge, dissenting.

I dissent from the majority of the court, believing that this instrument of writing ought not to be regarded as a mortgage. There is no mutuality preserved. Ranger might redeem within two years, but Desloge & Rozier could not even sue him on that instrument of writing after the expiration of the two years, in case the negro had died, and there is no evidence that they took any note to secure the payment of the money, in the event of the death of the negro. To suppose that they would rely on the implied promise of Ranger to pay an open account, for the goods they

had sold him, in the case of the death of that negro, is to suppose, that they were incapable of managing their own business. I, therefore, believe that neither party ever thought that the bill of sale, given by Ranger to Desloge & Rozier, was to be construed as a mortgage, until, accidentally, the price of negroes rose very high, or rather until the price of money sank very low.

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RICHARDSON and others v. MURRILL and others.

Trespass *quare clausum fregit*. Plea, that the close, &c. was the freehold of the United States, and not the freehold of plaintiff. Held: that the plea was bad, as possession, without title, is sufficient to maintain this action against a wrong doer.

Error to the Washington County Circuit Court.

COLE for Defendant in Error.

BRICKEY for Plaintiff in Error.

Opinion of the Court, delivered by Napton, Judge.

This was an action of trespass, *quare clausum fregit*, brought by the plaintiffs in error, against the defendants. Defendants pleaded not guilty, and a special plea, alleging that the close, upon which the supposed trespasses were committed, was not the freehold of plaintiffs, but the freehold of the United States. Plaintiffs demurred to this last plea, but the court overruled the demurrer, and gave judgment for defendants, the plea of not guilty, having been previously withdrawn; from this judgment plaintiffs appealed.

As possession, without title, is sufficient to maintain an action of trespass against a wrong doer, the plea of property in the United States was bad.

Judgment reversed, and case remanded.

maintain this action against a wrong doer.

Trespass
quare clausum fregit. Plea, that the close, &c. was the freehold of the United States, and not the freehold of plaintiff. Held: that the plea was bad, as possession, without title, is sufficient to

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The State.

A party cannot plead any matter to a *scire facias* on a judgment, which he might have pleaded to the original action.

Appeal from the Circuit Court of Cape Girardeau county.

SCOTT & ZEIGLER for Appellant.

BRICKEY for the State.

Opinion of the Court, delivered by Napton, Judge.

On the 26th of September, 1826, the State had judgment by *nil dicit* for \$221 52, against Watkins, in an action of covenant. On the 25th of January, 1838, a *scire facias* on this judgment issued from the clerk's office of the circuit court of Cape Girardeau county. To this the defendant pleaded: First, *nul tiel record*: Secondly, payment; and four additional pleas, setting forth, in substance, that the consideration of the obligation on which the judgment had been recovered, was loan office certificates, issued in violation of the constitution of the U. States.

The defendant, also, moved to vacate the judgment, because the consideration on which said judgment was founded, was illegal, unconstitutional, and void, and because the said judgment was obtained by fraud, misrepresentation; and mistake. The circuit attorney demurred to the four pleas, setting up the defence of illegal consideration, and took issues upon the pleas of payment and *nul tiel record*. The demurrer was sustained by the court—the motion to set aside the judgment overruled, and the issues submitted were found for the State, and judgment went against Watkins. Exceptions were taken, and saved, to the opinion of the circuit court.

No principle is better settled, than that to a *scire facias*, on a judgment, no defence can be pleaded, which might have been made to the original action. The principle is one uniformly adopted by the courts, and subject to no exceptions. Judgment, by confession, upon warrant of attorney, suf-

A party cannot plead any matter to a *scire facias* on a judgment, which he

ferred in pursuance of an illegal contract, do not come within the principle; and hence, it has been held, both in England and in this country, that such judgments may be set aside upon motion, or by *audita querela*. Ca. Temp. Hardwick, 220; Cowp. 727; 1 H. Black. R. 75, 1 John. Rep. 634, Note A.

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might have
pleaded to the
original ac-
tion.

The case of McFarland v. Irwin, (8 John. R. 77,) has been relied on as establishing an exception to this rule. In that case, the supreme court of New York, held the following language. "It is a settled rule, that the defendant cannot plead any matter to a *scire facias*, which he might have pleaded to the original action, or which existed prior to the judgment. A judgment, entered upon a warrant of attorney, is a judgment by confession, and the case of Bush, assignee of Jones v. Gower, (Ca. Temp. Ld. H. 220,) and of Cooke v. Jones, (Cowp. 727) were cases of *sci. fa.* upon a judgment entered by confession, on a warrant of attorney. The rule is the same, whether the judgment be obtained by confession, or default, or upon plea. The remedy, in these cases of judgment by confession, is by application to the court, upon motion, as was done in the case of Jackson v. Morely, cited Ld. Hardwick, in the case from Cowper.

The court, here, may have intended to say, that the rules of pleading, were the same in all the three cases specified: that in neither case, could the party, by *plea*, avail himself of any defence, except such as originated since the judgment; but that in case of judgments by confession, relief could be had by *motion*. This is the only interpretation of the language of the court which is consistent with the principles established in the cases which they cite; and thus understood, the case does not help the appellant.

In Cardisa v. Humes, (5 Serg. and Rawle, 68-9,) Gibson, J., says, "I take the law to be, that in no case, nor under any circumstances, can the merits of the original judgment be enquired into, for the purpose of furnishing a defence to a *scire facias*. When a judgment has been obtained surreptitiously, it will be set aside on motion, and when it is suffered by *confession* or *default*, if there be a defence,

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of which the party *was ignorant, or which arose afterwards*, the court, to give him advantage of it, will open the judgment; but in no other way can the equitable power of the court be interposed."

The language of Judge Gibson, in this case, confirms the doctrine of the court in *McFarland v. Irwin*, in relation of the admissability of pleas in all cases, and seems to countenance the opinion, that even in cases of judgment by default, or confession, the only way in which a defence could be made available, would be by motion, or *audita querella*.

But the precise mode in which a defence to a judgment, by confession, must be made, cannot be very material: it is sufficiently established, that neither by plea *audita querella*, or motion, can any such defence, going into the merits of the original action, be made, where the judgment has been regularly obtained. It is immaterial, so far as the present inquiry is concerned, whether the judgment be by default, by *nil dicit* or upon plea; if the party fails to make his defence, or is unsuccessful in making his defence, the judgment is conclusive, until reversed by writ of error.

A judgment by confession, is, in reality, nothing more than a record security; and when such judgments are suffered, in pursuance of some illegal contract, such as usury, or gambling, there is no reason why they should not be avoided. The judgment in such cases, is the consummation of the fraudulent or illegal contract, and whenever such illegality in the consideration, for which this judgment or record assurance has been given, is brought to the knowledge of the court, either by motion or plea, the court will set it aside. The party never had any previous opportunity of making his defence, no principle of law is violated, and the case is really not embraced within the general principle. *Flint v. Sheldon*, 13 Mass. Rep. 453; and *Killings v. Coolridge*, 14. Ib. 48.

It need scarcely be added, that the fact that the loan office law, had not been pronounced unconstitutional by the supreme court of the United States, when the judgment was recovered against Watkins, which has been relied upon as

a reason for his not making any defence to the original action, is entitled to no weight.

The judgment of the circuit court is affirmed.

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1842.

Moss
v.
Anderson.

MOSS v. ANDERSON.

- 1 Since the introduction of the common law, and the enactment of the statute of frauds and perjuries in 1816, lands cannot be conveyed in this State but by deed. Prior to that time, the laws of Spain, which prevailed in this country—when not abrogated by the constitution of the United States, and the laws of the territory—did not require a seal to an instrument of writing, to make it effectual for the conveyance of lands.
- 2 Under the provisions of the act of Feb. 1, 1839, concerning evidence, (L. of Mo. session 1838–9, p. 41,) it is not necessary to call the subscribing witnesses to the deed to prove the identity of the grantor, or to account for their absence; nor is their presence required by the rule that the best evidence should be produced. The proof of the identity of the grantor in a deed, by a person who is not a subscribing witness, is not evidence inferior to the proof of the fact by one who has attested it as a witness.
3. Ejectment: Plaintiff claimed by settlement and cultivation prior to 20th Dec. 1803, under the acts of congress of 2d March, 1805, and 13th June, 1812, and a confirmation by the act of 4th July, 1836. Defendant claimed likewise by settlement and cultivation prior to the 20th Dec. 1803, and under the acts of 2d March, 1805, and 13th June, 1812, and a confirmation by the act of 29th April, 1816. Neither claim was confirmed by metes and bounds. Upon the trial the court permitted the plaintiff to prove that the settlement of M., under whom defendant claimed, was not within the lines of the survey consequent upon plaintiff's confirmation, but was two miles off. Held: That this evidence was properly admitted, as the act of 2d March, 1805, provides, that the confirmation under it shall be for such lands as were actually inhabited and cultivated by the claimant.

Appeal from the Circuit Court of Franklin county.

COLE for Appellant.

SCOTT, ZEIGLER, & BRICKEY, for Appellee.

Opinion of the Court, delivered by Scott, Judge.

This was an action of ejectment, brought by John An-

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v.
Anderson.

Anderson against Mark Moss. Anderson derived title to the land in dispute from Roger Cagle, who claimed it by settlement and cultivation prior to the 20th December, 1803, under the acts of congress of the 2d March, 1805, and 13th June, 1812. Cagle's claim was confirmed to him, or his legal representatives, by the act of congress of the 4th July, 1836. Mark Moss, the defendant below, derived title to the land in controversy, from his father, Wm. Moss, who likewise claimed by settlement and cultivation prior to the 20th December, 1803, under the acts of congress of the 2d of March, 1805, and 13th June, 1812. Moss' claim was recommended for confirmation, and confirmed by the act of congress of the 29th April, 1816. Moss, it appears, never obtained a patent for the land confirmed to him, although by a law a patent could issue for the same. Neither the claim of Moss nor Cagle was confirmed by metes and bounds. The description of both claims was vague; that of Cagle being for 650 arpens, lying on Sandy creek, in the county of St. Louis; that of Moss being for 640 acres, lying on Sandy creek, in the same county. It was proved that the defendant below was in possession of lands included in Cagle's confirmation. On the trial, Anderson obtained judgment, from which Moss has appealed to this court.

Anderson, to show title in himself, produced a duly certified copy of an instrument of writing, not under seal, conveying Cagle's claim to W. Johnson, an intermediate grantee between Cagle and himself. The instrument had the name of Roger Cagle subscribed to it, as the person who had executed the same, and was dated the 6th October, 1807, and acknowledged on the same day, and recorded in the recorder's office of St. Louis county, in Feb'y. 1809. Before the copy was read in evidence, Anderson, the plaintiff below, made affidavit that the original, of which the instrument produced was a copy, was not, and had never been, in his power, that he had made a diligent search for the same, in places where it would most probably be found, without avail, and that he believed it was lost or destroyed. Another witness testified that after a diligent search, he was unable to find it, and expressed his belief that it was lost or destroyed. A

witness was then called, who stated that he had lived near Roger Cagle; that there was but one Roger Cagle; that to his knowledge Cagle never claimed the land in controversy after the sale to Johnson; that Cagle had lived on the said land, and afterwards went to Tennessee; that it was currently reported that Cagle had sold the land to Wm. Johnson. After this proof, the copy of the conveyance was read to the jury, under the 10th and 11th sections of the act of Feb. 1, 1839, supplementary to the act concerning evidence. To the introduction of this paper it was objected, First, that it was not a deed or conveyance within the meaning of the said act, it not being under seal. Whatever may be intended by the term conveyances, used in the statute now in force, regulating the alienation of land, that word, as employed in the act now under consideration, must be construed in the sense in which it was understood at the time of the execution of the instrument to which it relates. In 1807, the date of the instrument now in question, the legal title to but a small portion, if any, of the lands in the then territory, had passed from the government. The titles were mostly equitable. Hence, in the act concerning conveyances, of 1804, (Geyer's Digest, 127,) the words, "deeds and conveyances," were employed not to convey alone the idea of instruments passing the titles to lands, but of instruments by which they were in any way affected. It is true, the second section of the act, declaring that all deeds and conveyances shall be proved by one or more subscribing witnesses to such "deed," &c., dropping the word "conveyances," might be thought to imply, that the instruments to be proved must be sealed: but we would not be justified in holding that the law-making power, by a bare implication, intended to introduce forms of alienation of lands before unusual, and to which the early inhabitants were utter strangers. This opinion is strengthened by a knowledge of the fact, that a scroll affixed to an instrument by way of seal, did not make it a deed, unless actually sealed, till the year 1807. Geyer's Digest, p. 250. It is believed, that since the introduction of the common law, and the statute of frauds and perjuries, which took place in the year 1816, lands cannot be conveyed

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Since the introduction of the common law, and the enactment of the statute of frauds and perjuries in 1816, lands cannot be conveyed in this State but by deed. Prior

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to that time, the laws of Spain, which prevailed in this country—when not abrogated by the constitution of the United States, and the laws of the Territory—did not require a seal to an instrument of writing, to make it effectual for the conveyance of lands.

ed in this State but by deed. Prior to that time, the laws of Spain, which prevailed in this country, when not abrogated by the constitution of the United States, and the laws of the territory, did not require a seal to an instrument of writing, to make it effectual for the conveyance of lands.

White's Compilation, title "Contracts."

It was further objected, that the subscribing witnesses should have been called, or their absence accounted for, and that the original should have been proved once to have existed. The 10th section of the act concerning evidence, before referred to, declares, "that if any deed or conveyance is acknowledged, proved, and recorded according to law, though not recorded within one year from the date, it may be read in evidence, upon proof of such facts and circumstances, as, together with the certificate of acknowledgment or proof, will satisfy the court that the person who executed the instrument is the person therein named as grantor." The 11th section enacts, that whenever it shall appear that the original deed or conveyance, in the case specified in the preceding section, has been lost or destroyed, or is not in the power of the party who wishes to use it, a certified copy of the record thereof, and of the certificate of the acknowledgment or proof, shall be received in evidence upon like proof as is required in case of the original, and with like effect. It will be seen that the statute does not require that the subscribing witnesses should be called to prove the identity of the grantor, or that their absence should be accounted for; nor is their presence required by the rule, that the best evidence should be produced. The subscribing an instrument as a witness, is an act which in most cases leaves little or no impression on the mind, and we are only conscious of having done the act from seeing our signatures to it. If an instrument is not produced for inspection, few would be willing to say, after a lapse of many

Under the provisions of the act of Feb. 1, 1839, concerning evidence, (L. of Mo., session 1838-9, p. 41,) years, whether or not they had attested it. The proof of the identity of the grantor in a deed, by a person who is not a subscribing witness, is not evidence inferior to the proof of the fact by one who has attested it as a witness. If his identity is established to the satisfaction of the court, a cer-

tified copy of the instrument, together with the acknowledgment or proof, is evidence without regard to the source from which the proof is derived. Cases may arise, and circumstances may exist, which would induce a court to require the presence of the attesting witnesses, or the reason for their absence. From the length of time which has elapsed since the execution of this instrument, the probability of the death of the attesting witnesses, and the want of the least circumstance to show that their testimony was withheld for fear of its being unfavorable to the party who wished to use the copy in question, we are of opinion that the circuit court had sufficient evidence of the identity of the grantor, and that it did not err in permitting the certified copy to be read.

The court permitted the plaintiff below to prove that the settlement of Wm. Moss, under whom the defendant claimed, was not within the lines of the survey consequent upon his confirmation, but was two miles off. This was objected to and assigned for error. The act of congress of the 2d March, 1805, provides that the confirmations under it shall be for such lands as were actually inhabited and cultivated by the claimants. It is not perceived on what ground this objection is based. Moss's confirmation was for the land he had actually inhabited and cultivated. He was not authorised to survey any other; his survey was his own act; it was not a public or official act. This evidence does not go behind, or contradict the confirmation; it merely shows upon what it operated, and what was included in it. Any other construction of the act of Congress, would sanction the grossest frauds. A confirmer might otherwise locate his claim where he pleased, without regard to the rights of others. This view of the subject answers the argument, that Moss having the elder legal title, should prevail at law in an action of ejectment. Had the confirmation of the lands in dispute been made to him by metes and bounds, it might have been different. As it is, he has no title to the land, either legal or equitable.

The act of the 4th of July, 1836, by which Cagle's claim was confirmed, provides, that if any tract or part of a tract,

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v.
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it is not necessary to call the subscribing witnesses to the deed, to prove the identity of the grantor, or to account for their absence; nor is their presence required by the rule that the best evidence should be produced. The proof of the identity of the grantor in a deed, by a person who is not a subscribing witness, is not evidence inferior to the proof of the fact by one who has attested it as a witness.

Ejectment:
Plaintiff
claimed by
settlement and
cultivation
prior to 20th
Dec. 1803, under
the acts
of congress of
2d March,
1805, and 13th
June, 1812,
and a confirmation
by the
act of 4th
July, 1836.
Defendant
claimed likewise
by settlement
and cultivation
prior to 20th
Dec. 1803, and
under the acts

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1842.

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v.
Anderson.

of 2d March,
1805 and 13th
June, 1812,
and a confirm-
ation by the
act of 29h
April, 1816.
Neither claim
was confirm-
ed by metes
and bounds
Upon the
trial, the court
permitted the
plaintiff to
prove that the
settlement of
M., under
whom defend-
ant claimed,
was not with-
in the lines
of the survey
consequent

upon plaintiff's confirmation, but was two miles off. Held: That this evidence was properly admitted, as the act of the 2d March, 1805, provides, that the confirmations under it shall be for such lands as were actually inhabited and cultivated by the claimant.

confirmed by it, had been previously located by any other person, or had been sold under any law of the United States, the said act shall confer no title to such lands, in opposition to the rights acquired by such location and purchase. And it was contended for the defendant below, that this provision protected his location. After what has been said, it can scarcely be necessary to answer this argument. If the principles above stated be correct, it is clear that Cagle's claim had never been located or sold under any act of congress. Moss, by his confirmation obtained only the land he had actually inhabited and cultivated, and not that inhabited by Cagle, which was two miles distant.

There was no error in refusing the instruction asked for by the defendant below, no evidence having been given on which it could be predicated. Such instructions are always refused. They mislead the jury, and may impress their minds with the belief that there is evidence of a fact, when in truth there is not.

Judgment affirmed.

SMITHERS and others v. THE STATE, to use of Morris.

The sheriff of Gasconade county levied upon and sold certain property, as the property of M., afterwards the judgment was reversed, and restitution of the proceeds of the sale awarded against the sheriff, who had not paid over the money. This suit was instituted by the State, to the use of M. on the sheriff's bond, to recover the money. Defendants, the securities of the sheriff, pleaded, that the property levied upon was not the property of M.; to this plea there was a demurrer, which was sustained; defendants also pleaded, that M., before the rendition of the judgment, for the purpose of defrauding his creditors, had conveyed the property to one J. Verdict and judgment for M. Held: that as the judgment against M. was reversed, the enquiry into the fraud became immaterial.

Appeal from the Circuit Court of Gasconade county.

FRISSELL for Appellants.

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1842.

SHEELY for Appellee.

Smithers and
others
v.
The State.*Opinion of the Court, delivered by Napton, Judge.*

This was an action of debt, on a sheriff's bond, brought by the State, to the use of William Morris, against Joel Smithers and others, in the Gasconade circuit court. The defendants plead the general issue, and a special plea, alleging that the property levied on, and sold as the property of said Morris, (as alleged in the declaration) was not the property of said Morris, at the time it was alleged in the declaration to have been levied on and sold. To this last plea, there was a demurrer, which was sustained by the court. The defendants there filed another plea, setting forth, that the defendants were securities for the sheriff, Smithers, and that before the rendition of the judgment against said Morris, the said Morris, for the purpose of defrauding his creditors, had conveyed the property to one John W. Johnson; upon these, pleas, issues were taken, and verdict and judgment for plaintiff.

To establish a second plea, defendants read a record of a suit brought in the circuit court of Montgomery county, by Rebecca Dyer, against Morris, by which it appeared, that judgment was obtained against Morris for \$1,433; upon the judgment execution issued; and the return upon the execution was as follows:—"Executed by levying on, and selling the S. E. qr. of sec. No. 2, T. 45, R. 7, for the sum of three hundred and fifty dollars. And, also, by levying upon, and selling personal property to the amount of \$339 69 $\frac{1}{2}$, and the body of the said William, not found in my county.

JOEL SMITHERS, *Sheriff.*

By Samuel Harrison, Deputy Sheriff."

This judgment was afterwards reversed in the supreme court, as appeared by record introduced on the trial.

It also appeared, that an order had been made by the said

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1842.

Smithers and others v. The State. court of Montgomery county, directing Joel Smithers to refund the money so collected: that Smithers was duly notified to show cause, why said money should not be paid; and that judgment, by default, went against Smithers.

The State.

Deeds from Morris to Johnson were also read in evidence, conveying the property to said Johnson, and executed by Morris before the levy, and the record of an action of trespass, brought by Johnson, against the sheriff for the property levied on, on which the defendant had a verdict and judgment.

There seems to be only two points relied on here to reverse this judgment: First, because the declaration is defective, and second, because the verdict is unsupported by the evidence.

The last objection I do not think it necessary, minutely to examine, because I am not satisfied that the securities of the sheriff, should have been permitted to set up property in Johnson against the *return* of the sheriff. But whether this defence was properly admitted or not, it is clear, that by the record which defendants themselves offered, it appeared, that Rebecca Dyer was not a creditor of Morris, inasmuch as her judgment had been reversed by the supreme court. The inquiry into the fraud, was, therefore, immaterial, and the verdict of the jury was right.

The declaration may have been defective, in not averring a special request to Smithers, to pay this money to Morris, accompanied with a notice of the order of the Montgomery circuit court; but that defect has been cured by verdict. No motion was made in arrest of judgment; the judgment must, therefore, be affirmed.

LYON & KNIGHTON v. HARLOW and others.

MAY TERM.
1842.

The circuit court has no power to quash the writ, and dismiss the suit, because bail was improperly required, in an action commenced by capias.

Lyon &
Knighton v.
Harlow & others.

Appeal from the Circuit Court of Washington county.

BRICKEY & COLE for Appellants.

FRISSELL for Appellees

Opinion of the Court, delivered by Tompkins, Judge.

This was an action of trespass, commenced by the plaintiffs against the defendants, by writ of capias. The defendants having appeared, moved to quash the writ. The circuit court sustained the motion, and dismissed the suit.

The statute provides, that the court at any time pending the suit, if they be satisfied that bail ought not to have been required, may vacate the order, allowing the capias, or may direct the recognizance to be cancelled, or the defendant to be discharged from imprisonment; and in every such case shall order his appearance to be accepted, and the suit to proceed in all things, as if the original had been a summons. See Digest, page 453. The circuit court committed error, then, in quashing the writ, and in dismissing the suit. The plaintiffs should have been permitted to proceed in their suit, as if a summons had been issued in the first instance.

The judgment of that court is therefore reversed, and the cause will be remanded for further proceedings, in conformity with this opinion.

The circuit court has no power to quash the writ, and dismiss the suit, because bail was improperly required, in an action commenced by capias.

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1842.

HICKS & HAMMOND V. PERRY

Hicks & Ham-
mond v.
Perry.

When more property is sold by a sheriff, under execution, than is sufficient to satisfy the execution, and the property could have been sold in parcels, the court will set aside the sale on motion, but the motion must be made by a party, whose rights are affected by the sale.

Appeal from the Washington Circuit Court.

COLE for Appellants.

SCOTT & ZEIGLER for Appellee.

Opinion of the Court, delivered by Scott, Judge.

An execution was issued from the circuit court of Washington county, against John C. Scott, John Perry, and Joseph M. Stephenson, for the sum of \$318 07½, directed to the sheriff of Jefferson county. Under this execution, the sheriff, Hammond, levied on two tracts of land, containing, together, 204 acres, in each of which, Scott was entitled to an undivided half, although doubts were entertained as to the extent of his interest. After advertising that the lands would be sold between the hours of nine and ten o'clock, of the day appointed for the sale, the sheriff on that day, during the session of the circuit court, sold the two tracts together, and not in parcels, for the sum of five dollars, there being no higher bid; Hicks was the purchaser. Under this state of facts, John Perry, one of the defendants in the execution, and who, it appears, is a mere security for Scott, moved the court to set aside the sale, on the ground of irregularity; and alleged as a further cause, that there was fraud and collusion between Hammond and Hicks: all fraud and collusion between the appellants, was expressly denied, and there was no evidence of its existence. The court set aside the sale, and the cause is brought here by appeal. The land sold was the property of Scott. There is no allegation that he is unable to pay his debts, or that he is colluding with the appellants, nor is there any circumstance from which such a presumption can arise. This ne-

cessarily leads to the inquiry, why should Perry interfere in this matter? and had he even a right to interfere, does not the silence and acquiescence of Scott repel the charge that there was a sacrifice of the property. When more property is sold than is sufficient to satisfy a debt, and the property could have been sold in parcels, a court would set aside the sale. This appears to be the meaning of the 26th sec. of the act concerning executions. In this case, the property sold did not pay the debt, and it does not appear that the biddings were affected by the circumstance, that both tracts were sold together. We do not mean to say, that a sheriff would be justified in offering at the same time, different tracts of land, whether contiguous to each other or not, where it appears that a diminished price was the consequence of such a mode of sale. The law entrusts a sheriff with a discretion in conducting sales; he is the agent of both parties, and should dispose of the property in such a manner as will promote the interest of both plaintiff and defendant. Had Scott, himself, complained, the sheriff should have been compelled to show, that by offering both tracts together he was not damnified. As he acquiesces in the conduct of the sheriff, we do not think that the sale should have been set aside. If the sheriff has sacrificed the property, the party aggrieved has his remedy by action against him.

Judgment reversed.

MAY TERM.
1842.

Hicks & Hammond v. Perry.

When more property is sold by a sheriff, under execution, than is sufficient to satisfy the execution, and the property could have been sold in parcels, the court will set aside the sale on motion, but the motion must be made by a party, whose rights are affected by the sale.

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1842.

THE STATE V. PEPPER, et al.

The State
v.
Pepper, et al.

An appeal cannot be taken until final judgment has been rendered in the cause.

Appeal from the Washington Circuit Court.

Opinion of the Court, delivered by Scott, Judge.

A scire facias was issued against Pepper, and bail, on a forfeited recognizance. The parties appeared, and demurred to the scire facias. The demurrer was sustained, and the cause is brought here by the State.

An appeal cannot be taken until final judgment has been rendered in the cause. A motion was made to dismiss the appeal, because it appears from the record, that no final judgment has been entered in the cause. This motion must prevail. It appears from an inspection of the record, that the court simply gave a judgment sustaining the demurrer to the scire facias. No further entry is made in the cause. The suit, then, is still pending in the court below, and this appeal is improvidently brought here.

 REEVS V. HARDY & BUCKNER.

1. When the statements of the opposite party are offered in evidence, whatever was stated in the same conversation, whether adverse to the interests of the party offering the evidence or not, is also admissible.
2. A receipt given by a member of a firm in his own name, without reference to the firm, is not necessarily evidence that the money was paid in discharge of a debt due to the firm.

Error to the Circuit Court of Crawford county.

FRISSEL for Plaintiff in Error.

COLE for Defendants in Error.

Opinion of the Court, delivered by Tompkins, Judge.

Hardy & Buckner, the defendants in error, sued Josias

Reeves before a justice of the peace, and judgment being given against Reeves, he appealed to the circuit court. That court also gave judgment against him, and he prosecutes here his writ of error to reverse the judgment.

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1842

Reeves
v.
Hardy and
Buckner.

The bill of exceptions shows that Hardy & Buckner, in the circuit court, gave in evidence against Reeves, a note executed to them by Reeves, on which was endorsed a small credit. Reeves, on his part, gave in evidence a receipt, dated some time after the note which was sued on, signed by Thomas Buckner, one of the plaintiffs in this suit, before the justice, and the circuit court. The receipt was for all dues, debts and demands, up to this date, 25th March, 1838. The note was dated and due more than a year before the receipt; and Buckner was proved to have acknowledged the receipt; but he stated that the receipt "*had nothing to do with the bond in the suit.*" The jury found a verdict for the plaintiffs for the amount of the note, &c., deducting the credit. Reeves moved for a new trial, and the refusal of the court to grant this new trial is assigned for error.

The plaintiff in error insists that the receipt of Thomas Buckner ought to be evidence against Buckner & Hardy, and that it is error to bring the suit in the names of Hardy and Buckner, instead of using the given names of the plaintiffs. The last objection was not made before the circuit court and ought not therefore to have been urged here. And as to the first, it is sufficient to observe, that as the plaintiff in error gave in evidence the admissions of Buckner against his own interest, it was perfectly correct that what Buckner stated in the same conversation, in his own favor, should go to the jury.

But money paid to Thomas Buckner, and his receipt therefor, is not necessarily evidence that such money was paid for the use of Hardy & Buckner. It might have been the case, that Reeves owed money to Hardy & Buckner, and also to Thomas Buckner. The jury have chosen to consider it so, and we can see no reason to set aside their verdict.

The judgment of the circuit court is therefore affirmed.
in discharge of a debt due to the firm.

When the statements of the opposite party are offered in evidence, whatever was stated in the same conversation, whether adverse to the party offering the evidence or not, is also admissible.

A receipt given by a member of a firm in his own name, without reference to the firm, is not necessarily evidence that the money was paid

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1842.

SHOULTS V. BAKER.

Shoults
v.
Baker.

The act of 14th January, 1839, allowing a party to dismiss his suit in vacation, not containing any provision respecting the preservation of the evidence of such dismissal, the circuit courts may provide by rule for the preservation of such evidence. In the absence of any such rule, the entry of the clerk in a book kept by him for that purpose, or on a paper filed in the cause, would be sufficient evidence of such dismissal.

Error to the Circuit Court of Madison county.

HOLDEN for Plaintiff in Error.

BRICKEY for Defendant in Error.

Opinion of the Court delivered by Tompkins, Judge.

Baker brought his suit against Shoults before a justice of the peace, when he obtained judgment; and from that judgment Shoults appealed to the circuit court. The court also gave judgment against him; and to reverse its judgment, this writ of error is prosecuted.

Shoults, the plaintiff in error, contends that a former suit was pending for the same cause of action, to wit: the sum of one hundred dollars due on a promissory note, at the time this cause was decided before the circuit court.

It does not appear from the bill of exceptions in the case, that any transcript of the proceedings before the justice of

The act of the peace, in the cause charged to be pending, was produced in evidence in the circuit court, to prove the fact. And it was proved by the production of the entry of one of the papers on file in the said cause, that it had been dismissed. The plaintiff in error contends that the entry should have been made on the records of the court.

The act of the 14th of January, 1839, allows any person to dismiss his suit in vacation, but does not direct how the evidence of such dismissal shall be preserved. The circuit court might make a rule for the preservation of the evidence of such dismissal; but it does not appear that any such rule had been made in that court, and in the absence of such rule I cannot conceive any better method the clerk could have

The act of 14th January, 1839, allowing a party to dismiss his suit in vacation, not containing any provision respecting the preservation of the evidence of such dismissal, the circuit courts may provide by rule for the preservation of such evidence: in the absence of any

adopted, than that adopted on this occasion. It would seem unnecessary for the clerk to enter his proceedings in the causes during vacation in the same books with those of the court in term time, unless there was some authority conferred either by the statute or by an order of the circuit court.

MAY TERM.
1842.

Shoults
v.
Baker.

There appears, then, to be no reason to reverse the judgment of the circuit court, and its judgment is therefore affirmed.

such rule, the entry of the clerk in a book kept by him for that purpose.

pose, or on a paper filed in the cause would be sufficient evidence of such dismissal.

LACOMPTE V. SEARGENT.

No principle of law is better settled than, that an executor or administrator is, for every purpose, the owner of the moneys of his testator or intestate, which have come to his hands. Therefore, where an administrator took a note for money loaned, in which note he was named A. B., administrator, &c. the individual debts of the administrator may be set off against the note.

Appeal from the Circuit Court of Ste. Genevieve county.

SCOTT & ZEIGLER for Appellant.

COLE for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

Ichabod Seargent sued Eloy Lacompte and Joseph Bogy in the circuit court of Ste. Genevieve county, and obtained judgment against them. They appealed from that judgment, and Bogy dying in the mean time, Lacompte, the surviving partner, prosecutes the appeal.

The suit was founded on a note in these words, viz: "Received of Mr. Ebenezer Dickey, administrator of the estate of Antoine Simmino, deceased, seven hundred dollars, which we will pay him at any time, clear of interest.

(Signed) BOGY & LACOMPTE."

On which note or receipt, (as it is called,) were endorsements, made by Dickey, of payments to the amount of

MAY TERM.
1842.

Lacompte
v.
Seargent.

five-hundred and forty-six dollars and fifty-nine cents. The circuit court gave judgment for one hundred and sixty-four dollars and forty-one cents, the balance due in the note after deducting the credits endorsed. The defendants in the circuit court offered in evidence certain orders made by the said Dickey to them to pay money, which it was admitted they had paid; and they proved also, that said Dickey had purchased from them certain articles of merchandise after the deposit of said sum of money. And it was admitted that the said Dickey had no account with them before said deposit of money, and that all the moneys proved to be paid by them, were paid while Dickey was administrator, and also that the goods were purchased while he was administrator as aforesaid. And on the part of the defendants, it was admitted, that the said Seargent was administrator *de bonis non*, of the said Antoine Simmino, in the place of said Dickey.

These facts being admitted to be proved, the circuit court rejected the evidence of moneys paid, and also of the goods purchased by Dickey from the defendants below, while he was administrator as aforesaid.

No principle of law is better settled than, that an executor or administrator is, for every purpose, the owner of the moneys of his testator or intestate, which have come to his hands.— Therefore, where an administrator took a note for money loaned, in which note he was named A. B., administrator, the individual debts of the administrator may be set off against the note.

No principle of law is more generally acknowledged, than that the executor or administrator is, for every purpose, the owner of the moneys of his intestate which have come to his hands. Accordingly a count, on a promise made by a defendant, as administrator, to pay money received by him as such, to the plaintiff's use, cannot be joined with another count on promises made by the intestate. See 4 Durnford and East, 347: Farr and others v. Newman, et al. The money, then, for which the note here sued on was given, was the money of Ebenezer Dickey, subject, in the hands of the defendants, Bogy and Lacompte, to their claim for all sums which they may have paid on the order of Dickey, after the deposit was made, and also the price of the goods which he afterwards purchased from them, was a fair set off against their note; and the circuit court ought to have permitted them to give evidence of those several sums of money paid by them, on the order of Dickey; and of the goods sold to him. The words, "Administrator of the estate," &c., used

in the note given by Bogy and Lacompte, are mere *descriptio personæ*. MAY TERM.
1842.

Because, then, the circuit court did not permit such evidence to be given, its judgment is reversed, and the cause is remanded, to be proceeded in as above directed.

The State
v.
Hinkson.

THE STATE V. HINKSON.

1. When an account against the State is certified to the Auditor of Public Accounts, it is only conclusive on the Auditor as to the correctness of the statements therein made, and it is the right and duty of the Auditor to decide whether the State or the county is required to pay the whole or any part of such account. It is his duty to see that no illegal demands are paid by the State.
2. Each county is required to keep a good and sufficient jail, and there is no law subjecting the State to any charge for guarding county jails.

Error to the Circuit Court of Washington county.

BRICKEY for the State.

COLE for the Defendant.

Opinion of the Court, delivered by Tompkins, Judge.

The State of Missouri sued Hinkson in the circuit court of Washington county, when judgment being given for Hinkson, she sues out her writ of error to reverse that judgment.

Hinkson was sheriff of Washington county, and was sued by the State on his official bond; and it is assigned as a breach, that he retained in his hands \$594.74 of moneys belonging to the State. Hinkson set off a demand against the State of \$659.75, for fees and charges for the keeping Edward Wideman, in the years of 1831 and 1832, who had been indicted in the circuit court of Washington county for murder. This allowance had been made to the person who was sheriff in those years, and it was admitted that Hinkson

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The State
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When an account against the State is certified to the Auditor of Public Accounts, it is only conclusive on the auditor as to the correctness of the statements therein made, and it is the right and duty of the auditor to decide whether the State or the county is required to pay the whole or any part of such account. It is his duty to see that no illegal demands are paid by the State.

was entitled to the same credit on account of that allowance, that the then sheriff was. This account had been presented to the auditor of public accounts, and he had rejected it. The allowance to the sheriff for keeping a prisoner, that is, his board, is thirty-seven and a half cents per day; and if it be admitted that the prisoner was kept in confinement two years, the sheriff would not on that account have been entitled to the half of what has been allowed him. We must suppose then that a guard was employed by the sheriff, and that the pay of the guard is charged to the State. It cannot otherwise be conceived how his account should have been run up to such an amount. If this be the case it is clear that the State is not liable. The act of 30th of December, 1824, (see Digest, page 414,) declares that the expenses of a guard (when necessary) shall be audited and paid as the other county expenses. Each county is required to keep in good and sufficient repair a common jail. (See 1st section of same act, p. 410.) To the same purpose is the act of 1835. (See sections 1 and 23, of the act on pages 135 and 137 of the Digest of the year 1835.) It is the opinion of every member of this court that when an account is certified to the auditor as the law requires, it is only conclusive on the auditor as to the correctness of the statements therein made: But it is equally the opinion of each member of this court, that it is the right and duty of the auditor to decide whether the county or the State ought to pay the whole or any part of such account. He is the immediate agent of the State; and as such it is his duty to guard its interests, and see that no improper demands are paid by the treasury. Should the auditor refuse to allow a just account, the creditor of the State must resort to some judicial tribunal having jurisdiction of the subject matter. Cases have occurred in which the auditor has refused to allow accounts certified by the supreme court of this State, but they do not appear to have been reported. The law at that time did not require all the cases decided to be reported. I well recollect that a mandamus issued to the auditor, and that the court re-examined the account assisted by the advice of the attorney general, and in all respects treated the

matter as an appeal from the decision of the auditor. The law of 1837 requires the clerk of the circuit court to make out under the direction of the circuit judge and of the circuit attorney, a full statement of all the costs incurred in cases where the state is liable to pay costs; and this statement is required to be signed by the judge and circuit attorney, and the auditor is required to audit and adjust the same, and draw his warrant, for the amount by him allowed, on the treasurer. But it could not be for a moment supposed that the auditor ought to have allowed the charge for a guard to the jail, even though the accounts were certified by the judge, and circuit attorney. Their certificate was intended to ascertain the truth of the facts only, as whether such costs and charges were incurred. But if by negligence or mistake they charge to the State what the State is not bound to pay, it is the duty of the auditor to reject so much of such accounts as is improperly charged to the State.

The act declares indeed that all accounts so certified shall be a sufficient voucher for the auditors warrant, but it did not intend that he ought to draw his warrant, whether the costs allowed were legal or illegal.

The judgment is reversed and the cause remanded.

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Each county is required to keep a good and sufficient jail, and there is no law subjecting the State to any charge for guarding county jails.

McCABE V. HEIRS OF HUNTER.

1. In proceedings at law in partition, the plaintiff or petitioner must show in himself a legal title to the premises sought to be divided.
2. A freehold estate cannot be conveyed but by deed.

Error to the Circuit Court of Washington county.

Opinion of the Court, delivered by Scott, Judge.

This was a proceeding in partition by McCabe against the heirs of M. Hunter. Two pleas were entered to the action: First, that there had been a partition of the premises be-

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tween Andrew Hunter from whom the heirs derived title by inheritance, and Rhodes Fisher, under whom the plaintiff, McCabe, claimed. Secondly, that they did not hold the land together with the plaintiff. On the trial, Hunter's heirs obtained a verdict and judgment, to reverse which this writ of error is prosecuted.

The plaintiff to show title in himself, offered in evidence an instrument of writing executed by Rhodes Fisher, purporting to convey to him all Fisher's interest in the land sought to be divided. The instrument was unsealed.

In proceedings at law in partition, the plaintiff or petitioner must show in himself a legal title to the premises sought to be divided.

In proceedings at law in partition, the plaintiff or petitioner must show in himself a legal title as contradistinguished from an equitable one: otherwise he must fail. It will be necessary, then, to enquire whether the instrument offered in evidence did convey to the plaintiff such a legal title as would support his proceedings, or in other words, whether an estate in fee can be conveyed otherwise than by deed; that is to say, whether a seal is essential to such conveyance.

A freehold estate cannot be conveyed but by deed.

Upon the introduction of the Norman customs in England, lands were transferred by livery of seisin alone, which was in imitation of the ancient feudal investiture. Sometimes this mode of alienation was evidenced by deed which served to ascertain more accurately the nature and terms of the transfer. Afterwards as wealth and commerce increased, and as the manners and habits of the people became more refined, the alienation of land became more intricate, and it was invariably evidenced by writing. Notwithstanding, however, before the enactment of the statute of frauds and perjuries, land might have been transferred by parol contract only, provided it was accompanied by a solemn and public delivery of the possession. (Cruise's Digest.)

The statutes of Uses, 27th Henry VIII., gave rise to the deed of bargain and sale. This mode of conveyance which prevails here, is equivalent to the deed of feoffment with livery of seisin.

By the common law, estates, less than a freehold, might be created or assigned either by deed, by writing, without seal, or by parol only. The statute of 29th Charles II.,

known as the statute of frauds and perjuries altered the common law, and required all interests in land except leases not exceeding in duration three years to be conveyed by deed or note in writing.

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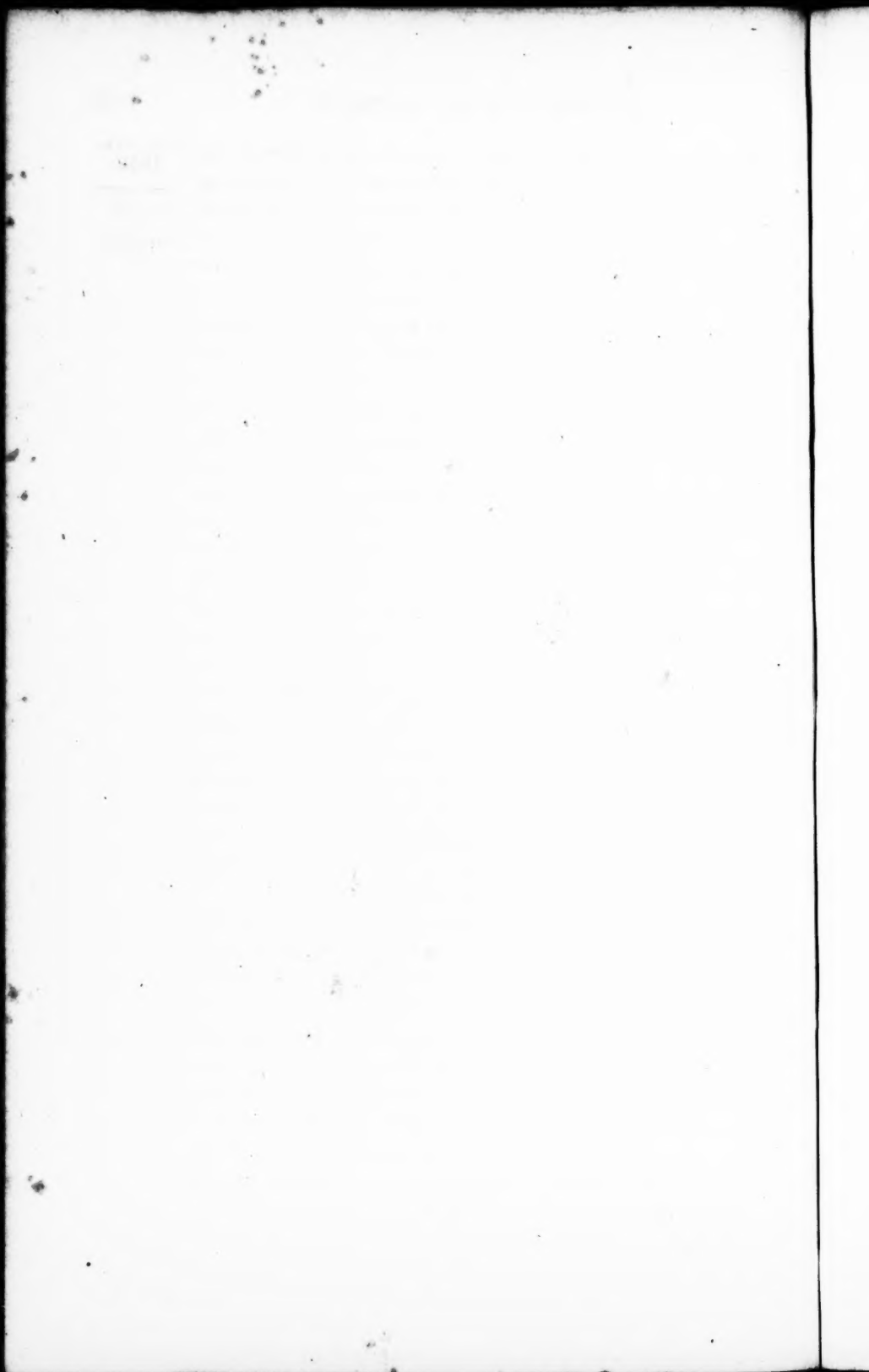
The construction put upon this statute is, that the common law distinction between freehold estates and estates less than freehold still subsists, and that a deed is necessary to convey a freehold interest in lands. *Fry v. Phillips*, 5 Burrow, 2827.

It has been argued, that there is nothing in our statute concerning conveyances, which requires an instrument conveying lands to be sealed. The statute uses the word "conveyance," to designate all instruments conveying lands from one to another. Blackstone says, deeds, which serve to convey the property of lands and tenements from man to man are commonly denominated conveyances. 2 Blackstone 309. We have seen that in England the word conveyance carries with it the idea of a sealed instrument. This word is used by our legislature in the sense in which it is understood in England. This seems apparent from the 26th section of the act relative to conveyances, which declares that no covenant expressed or implied in any conveyance, shall bind a married woman, &c. A covenant cannot be created but by deed. The legislature, then must have had in mind the idea of a sealed instrument, when the word "conveyance" is used. This view of the subject is perhaps strengthened by the seventh section of the same act.

The principles here stated relative to the alienation of freehold estates, cannot be considered as having existence in this State prior to the introduction of the common law, an event which took place in the year 1816.

As this point is decisive of the cause, we do not feel called upon to determine the question of variance arising upon the replication of *nul tiel* record to the plea of a former partition. If a variance does exist, there are cases in which it may be obviated by an averment of identity. We will not undertake to determine whether such an averment can be made in this case. 3 Starkie, 1606.

Judgment affirmed.



DECISIONS
OF THE
SUPREME COURT OF MISSOURI.
THIRD JUDICIAL DISTRICT,
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EVANS, Appellant, v. WILDER, Appellee.

1. A deputy sheriff may execute a deed for land sold under execution, but it must be in the name of his principal.
2. A. became the purchaser of land at sheriff's sale, while the act of 28th June, 1821, for the relief of debtors and creditors, was in force. In pursuance of that act, a certificate of purchase, signed by the *deputy* sheriff, was given to the purchaser. A judgment creditor redeemed the land, and took a deed for the same, dated 26th May, 1826, and executed by the successor in office of the former sheriff. The act of 28th June, 1821, was repealed 11th January, 1822, with a saving of the validity of all proceedings had under the same before the repealing thereof. Held: That the certificate of purchase, given by the sheriff, under the act of 28th June, 1821, did not authorise his successor to execute the deed, for that could only be done by petition to the circuit court; but even if the sheriff had been so authorised, yet the certificate of purchase being signed by the deputy sheriff in his own name, was void.

Appeal from the St. Louis Circuit Court.

SPALDING, GEYER, & BOWLIN, for Appellant.

GAMBLE for Appellee.

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Opinion of the Court, delivered by Scott, Judge.

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This case is reported in the 5th volume of the Missouri Reports, page 313. Since the reversal of the former judgment it has been tried again in the circuit court, and is a second time brought here by appeal. In addition to the facts stated in the former report of the cause, it appears that Evans, on the last trial, in order to show title in himself, produced in evidence a judgment which Adam Everly had recovered against Risdon H. Price, in the St. Louis circuit court, on the 25th day of August, 1820, for the sum of \$914.15. On this judgment an execution issued, dated the 26th December, 1820, and made returnable to the first Monday of April following. After the return day named in the writ, the sheriff advertised the lot in dispute for sale, and after giving twenty days notice, sells the same during that term of the court. It appears from recitals in the advertisement, and the sheriff's deed, that a levy was made on the lot prior to the return day of the execution, and a sale advertised, which did not take place, for the reason it was countermanded by the plaintiff in the execution. Hempstead became the purchaser of the lot at the sale, and received a deed, bearing date May 29th, 1821, and afterwards by a deed in which it was recited he had purchased the lot as agent for certain creditors of Risdon H. Price, and that Price had made arrangements with those creditors, and that he, Hempstead, had no equitable title to the lot, and that it was claimed by several creditors of Price, conveyed the same to Gustavus A. Bird, without recourse, in consideration of the sum of \$25, paid by him to defray the expenses of the trust incurred by Hempstead, in trust to secure to him, Bird, the said sum of twenty-five dollars, and then for the use of R. H. Price, subject to the claims and liens of his creditors. Bird afterwards by a deed, reciting the circumstances under which he took the lot from Hempstead, and the trust to which it was subject, and that Evans had recovered a judgment against Price, and that the outstanding title was an obstacle to his rights, conveys the lot to Evans, the appellant, for the sum of \$28.75, to hold the same in trust for the said

Price, subject to the amount Evans had paid, and all the just claims and liens of the creditors of said Price.

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The court are divided in opinion as to the validity of the title to the lot thus made out by the appellant Evans, and the opinion of the majority is based on a point that was made when this case was formerly before the court, and which at that time it was deemed unnecessary to determine. It will be recollected, that the appellee, to show an outstanding title in a third person, and thereby defeat the recovery of the appellant, gave in evidence several judgments and executions therein issued from the supreme court of this State; that these executions were executed under the law of the 28th June, 1821, for the relief of debtors and creditors, and Thomas F. Riddick became the purchaser. In pursuance of said act, a certificate of purchase was granted to Riddick. This certificate was signed by the deputy sheriff. Perschouse, a judgment creditor of Price, redeemed the lot, and took a deed for the same to himself and Comegys. This deed was executed by I. K. Walker, the successor in office to J. C. Brown, who was the sheriff when the lot was sold to Riddick. This deed was dated the 26th May, 1826. The act for the relief of debtors and creditors was repealed on the 11th January, 1822, with a saving of the validity of all proceedings had under the same before the repealing thereof. Something was said in the argument of the cause, about the constitutionality of the act of 1821, for the relief of debtors and creditors; but the question here under consideration will not be affected by the manner in which the question of its validity may be determined. If the law was unconstitutional, then it would seem that the whole interest in the land would pass to the purchaser, and he would take it without any equity of redemption, either in the debtor in the execution or his judgment creditors: but then there must be some instrument in writing, conveying the title to the purchaser, for it has been determined that a sheriff's sale is within the statute of frauds and perjuries. *Simonds v. Catlin*, 2 I. R. The purchaser then must obtain a title either from the certificate of the sheriff, or by a deed executed in conformity with the general law on the subject of executions.

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A deputy sheriff may execute a deed for land sold under execution, but it must be in the name of his principal.

A. became the purchaser of land at sheriff's sale, while the act of 28th June, 1821, for the relief of debtors and creditors, was in force. In pursuance of that act, a certificate of purchase, signed by the deputy sheriff, was given to the purchaser. A judgment creditor redeemed the land, and took a deed for the same, dated 26th May, 1826, and executed by the successor in office of the former sheriff. The act of 28th June, 1821, was repealed 11th January, 1822, with a saving of the validity of all

If he relies on the certificate of the sheriff, it will fail him, because it was signed by the deputy sheriff, and not in the name of his principal. A deputy sheriff may execute a deed for land sold under execution; but then it must be in the name of the principal. A return to an execution signed by the deputy sheriff is void. *Simonds v. Catlin*, *ib.* It is not pretended that a deed for the lot was executed in conformity to the provisions of the law regulating sales under execution, but it is urged that the deed from Walker, the sheriff, to Perschouse and Comegys, Walker being the successor of J. C. Brown, the sheriff when the sale was made, is sustained by the provision of the act for the relief of debtors and creditors, which authorised the successor in office to the sheriff who made the sale, to execute a deed to the purchaser for the land sold under execution, if it is not redeemed. The act for the relief of debtor and creditor was repealed before the execution of this deed; the repealing law preserves every thing that had been done under it; it saves the rights that had been acquired by it; but there is nothing in its provisions that would justify the construction that its vitality is continued as to the sales that had taken place under it, until the rights acquired by those sales had ripened into legal titles. If this construction was necessary for the preservation of those rights, or if there was no other mode pointed out by which titles to the lands purchased under the law could be acquired, there would be more propriety in insisting on it. But there was a provision applicable to such cases, which prescribed the mode by which a party purchasing lands at a sheriff's sale should obtain a deed for the same from the successor to the sheriff by whom the sale was made. The certificate delivered to the purchaser under the act, if properly authenticated, would be evidence that the purchaser was entitled to a deed, and would facilitate the obtaining of one; but of itself, it did not operate as a deed, nor did it authorise the successor to the sheriff to execute one to the purchaser: that could only be done by petition to the circuit court, setting forth the facts necessary to entitle the party to a deed. This step has not been taken, and we are constrained to say, that the deed having been executed with-

out authority of law, is void. But even admitting that the act for the relief of debtors and creditors continued in force as to the sales that had taken place under it, and authorised the successor to the sheriff making a sale to execute a deed for the land sold, if Riddick obtained no right under the sale, the certificate being signed by the deputy sheriff, and therefore void, how could others derive a title through him? By the ancient common law a sheriff was not required to sign the returns: but by a statute passed as early as the twelfth year of Edward the second, he was required to return his name, together with the writ.

Judgment reversed.

Opinion of Napton, Judge.

Many of the points in this case have been determined by this court when it was before the court in 1838. See 5th Mo. Rep. p. 313. The judgment of the circuit court having been reversed, and the case remanded, it is a second time brought before this court, and, as now presented, involves the consideration of a new title set up by Evans. This title is derived from a judgment and sale in favor of one Adam Everly against Risdon H. Price. This judgment was in August, 1820; execution issued 26th December, 1820, returnable the first Monday of April following. The return of the sheriff was as follows: "Rec'd. 28th December, 1820, John K. Walker, D. Sh'ff. Entered on E, book No. 2. Interest \$33.34; single comm. \$15.16; am't. \$981.18. Made by the sale of the property described in the enclosed advertisement, to C. S. Hempstead, on the first day of May, 1821, the sum of one hundred and ninety-three dollars. The costs were paid by the defendant, Price, previous to the sale.

JOHN K. WALKER, D. Sh'ff."

The advertisement above referred to, was as follows:—"Sheriff's sale. By virtue of one writ of execution to me directed, from the circuit court of St. Louis county, returnable to the April term of said court, 1821, (which is now in session,) in favor of Adam Everly against Risdon H. Price, on which certain property of said Price was advertised to

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proceedings had under the same before the repealing thereof. Held: That the certificate of purchase, given by the sheriff, under the act of 28th June, 1821, did not authorise his successor to execute the deed, for that could only be done by petition to the circuit court; but even if the sheriff had been so authorised, yet the certificate of purchase being signed by the deputy sheriff in his own name, was void.

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be sold on Friday the sixth day of April last, but was postponed by request of plaintiff's attorney, I have levied upon, (Here follows a description of the property.) I will sell to the highest bidder, for cash, at the court house door, in the town of St. Louis, on Tuesday, the first day of May next, between the hours of nine o'clock, A. M. and six, P. M. of said day, to satisfy said execution and costs. St. Louis, April 10th, 1821.

ISAAC C. MCGIRK, D. Sh'ff.

For Jos. C. Brown, Sh'ff."

The sheriff's deed made to Hempstead, the purchaser, recites, that a levy was duly made in March, 1821, as appears by advertisement accompanying the execution, &c. It appears, then, from the execution, return, and advertisement, that the sheriff first advertised the property in March before the return day of the writ, but that no sale took place in pursuance of that advertisement, in consequence of directions given by the plaintiff's attorney. It appears, also, that during the term, and after the 6th day of the same, the sheriff again advertised the property for sale, and that it was sold under the last advertisement. The validity of this proceeding is questioned, on the ground that after the return day of the writ the sheriff had no power to levy on the property, and consequently that the sale under that levy conveyed no property. A *levy*, it appears to be agreed on both sides, is nothing more than an appropriation, by the sheriff, of the land designed to be levied on, indicated by some act, such as advertisement, or hand-bills. It is also conceded that when the levy is made before the return day of the writ, any act necessary to complete the sale, performed after the return day of the writ, will be valid, at least in favor of a bona fide purchaser. But where there is no levy before the return day of the writ, I understand the law to be well settled, that a subsequent levy will be void. I have seen no authority which calls in question this doctrine. As the act of 7th Nov. 1808, however, allows the sheriff until the last day of the term to make his return, it is supposed that the writ is kept alive during the whole term, not only for the purpose of selling the property advertised previously to the commencement of the term, but for the purpose of mak-

ing the advertisement or levy itself. To this argument I cannot assent. The policy of the law, or express statutory provisions, may, for good reasons, give efficiency and vitality to a writ for certain purposes, and to secure the rights of innocent purchasers. The return day of the writ, is a matter appearing on the face of the writ; it is not necessarily the same as the day in which the law allows the sheriff to return his writ. This statute, giving the sheriff until the last day of the term to make his returns, does not affect the question, what is the *return day of the writ*? That question is answered by looking at the writ itself, and in that way only. This writ was made returnable, not at any day during the term, but on a specific day, and after that day had passed by, the sheriff made his levy, and under that levy sold the property. Such sale, in my opinion, conveyed no title. Entertaining this opinion in relation to the sales under the Everly judgment, I think it unnecessary to inquire into the effect of the conveyances from the sheriff to Hempstead, from Hempstead to Bird, and from Bird to Evans. The title of Wilder, under the judgments recovered in this court, in favor of Hunter, Coalter, and the Bank, was investigated by this court when the case was before the court in 1838. Such points as this court passed upon and decided in the former investigation, I do not propose to re-examine. There are some questions, however, touching the validity of this title, which seem not to have been decisively acted on by the court. One objection made on the trial, which, if sustained, would appear to be fatal, was the want of a legal deed from the sheriff to Comegys and Perschouse. On this objection the court, in its former examination of the case, did not undertake to decide. To effectuate the rights of innocent purchasers at Sheriff's sales, especially after a great lapse of time, courts have not been disposed to look very closely into the regularity of all his proceedings. Irregularities on the part of the sheriff have been held not to vitiate a title derived under his sale; but when a question of power on the part of the sheriff is involved, it rests on different grounds. If the sheriff has no power to sell, his deed must be ineffectual to convey title. In this case, after the repeal

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of the act of 20th June, 1821, for the relief of debtors and creditors, by the act of 11th January, 1822, the sheriff then in office undertook, by virtue of authority vested in him by the first named act, to convey this land to Comegys and Perschouse, who were judgment creditors. The repealing act provided, that all proceedings had under the authority of the act of 1821. *before the passage of the repealing act*, should be valid. This deed did not come within the *terms* of the repealing act; was it embraced within its spirit and meaning? If the vested rights secured by the repealing act of 1822, could not be enforced, except under the provisions of the act of 1821, it might induce a court to strain the language of the act of '22, in order to give efficacy to its provisions. But if the general law in force at the time of the repealing statute provided ample remedies for enforcing the rights which accrued under the redemption law, there would be no reason for disregarding the letter of the repealing law, with a view to seek remedies for rights that had accrued and been secured. The law in force at the time when the repealing act passed, provided a mode by which purchasers at sheriff's sale might procure a title from the successor of the sheriff who made the sale. That course was not pursued here. The sheriff, of his own motion, without any action on the part of the court, with no means of officially knowing the steps taken by his predecessor, undertook to make the deed to Comegys and Perschouse, under the act of 1821. It has been suggested in argument, that the *certificate* of the sheriff under the act of 1821, would be sufficient of itself, if the law were unconstitutional, or the subsequent deed void, to convey the legal title. It may be observed, that it is a pervading principle in all our laws on this subject, that a sheriff's sale does not of itself convey the legal title. The sheriff's certificate, under the act of 1821, could not have been designed or supposed to convey the legal title; if it had, no subsequent provision would have been made for executing a deed. Nor was it ever held under our laws previous to 1821, or since, or under similar acts of other States, that a *mere sale* by a sheriff, passed the legal title. If, then, the act of 1821, for the relief of debtors and creditors, was uncon-

stitutional, or the deed made under its provisions, but after its repeal, was void; it is clear, that the legal title of Price, at the time of the sale under executions issued on the judgments of this court, was not divested. No objections appear to have been suggested to the title derived under Evan's judgments in 1829. The judgment of the circuit court should in my opinion be reversed, and the cause remanded.

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Where parties mutually covenant, the one to convey, and the other to perform certain acts as the consideration of the conveyance, the failure of either to perform his part of the covenant gives a right of action to the other on the covenant, although such failure may work a forfeiture of the rights of one of the parties, for the other may waive such forfeiture.

Error to the Circuit Court of St. Louis county.

GEYER for Plaintiff in Error.

GAMBLE for Defendant in Error.

Opinion of the Court, delivered by Tompkins, Judge.

Lucas commenced his action in the circuit court of Saint Louis county, and judgment being there given against him, he prosecutes this writ of error to reverse that judgment. This is an action of covenant brought on a deed sealed and delivered, by the defendants, by their attorneys. The deed set out in the declaration recites, that a joint stock company was formed by the defendants and others, for the purpose of building a hotel in the city of St. Louis, and that such company intended to apply for an act incorporating the said company; and that the defendants, and others of that company, had, by power of attorney, authorised the purchase from the plaintiff of a half square of ground in said city on

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such terms as they might judge to be expedient, and to bind the said company by contracts and writings in their own names. The deed then recites, that the said attorneys did agree to purchase from the said plaintiff, for the use of said company, for such purpose, the east half of the square immediately north of the court house, fronting 228 feet on Fourth street, at the rate of \$150 per foot: that \$10,000, part of the consideration money, was to be paid in stock of said company, to be subscribed by the plaintiff, and the residue to be paid in two instalments, one-third thereof in five years after the date thereof with interest at the rate of six per cent. per year, from the date of said deed, and the residue in ten years from such date, with interest at the rate of six per cent. per year, from such date, to be paid annually; that the said company should be bound to erect a hotel on said half square, and commence the building of the said hotel on or before the first day of April then next, and should complete the same without unnecessary delay, and that the said property should be mortgaged to the said plaintiff to secure the payment of the said purchase money, and the full performance by the said company of all their agreements; and that in consideration of the premises, the said Lucas did covenant and agree to and with the attorneys of said company, that he would, on the reasonable request of the agents of said company, make, execute, and deliver to them a good and sufficient deed of conveyance of said half square. &c., provided that he be allowed thirty days to execute and deliver such conveyance, after he shall be requested in writing, and that he shall not be bound to deliver such conveyance at any time, unless the party to whom such conveyance is required to be made, shall assure to him a number of shares in the capital stock of said company, amounting to ten thousand dollars, as part of the consideration of said conveyance, and also shall execute and deliver to said John B. C. Lucas, their promissory notes for the residue of the consideration money and interest, payable at the times and in the manner in said agreement specified; also, a covenant binding said company to erect the said hotel on the lots to be conveyed, to commence the same on or before the first

day of April then next, and to complete it without unnecessary delay, together with a deed of trust to such person or persons as shall be named by the said John B. C. Lucas, to secure the payment of the consideration money and interest according to the tenor and effect of the promissory notes so to be executed, and the performance of the covenants so to be made and entered into; and that it was further agreed between the parties, that the "agreements, acts, and things, in this agreement contained, to be performed by or on behalf of the said company before and at the time when the execution and delivery of the said conveyance shall be required of the said Lucas, shall be done, performed and fulfilled, on or before the first day of April next, otherwise, the said John B. C. Lucas shall be discharged and released from his covenant and agreements aforesaid, and no longer be bound thereby, to all intents and purposes, &c." The declaration then avers, that although the defendants and their associates were afterwards incorporated, &c., and that the said company, in part execution of said agreement and covenants, did enter upon and take possession of the said half square of ground, and commenced to erect a hotel thereon, and thence hitherto to occupy and possess said half square of ground for the purposes aforesaid, and that the plaintiff hath always from the time of making said covenant done and performed all things on his part to be done and performed, and still is ready and willing to do and perform such things according to the tenor and effect and true meaning of the said recited covenants and agreements; yet neither the said defendants, nor any persons on their behalf, did or would convey or assure to the said plaintiff any share or shares in the capital stock of said company, as a part of the consideration of the said conveyance, nor execute and deliver to said plaintiff their promissory notes for the residue of the consideration money and interest, payable as in said agreement specified, nor did they execute or deliver to said plaintiff any covenant binding the said corporation to erect the said hotel on the said lots, &c., nor any deed of trust to secure the payment of the consideration money and interest, and the performance of the covenants according to

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the tenor and effect of the said recited agreement. It is then averred, that a large sum of money, to wit, two thousand dollars, hath long since become due and payable to him, for interest of the purchase money of said half square of ground; according to the terms of said agreement, and that no part thereof has been paid. The defendants pleaded to this declaration, and the plaintiff demurring to the plea, the court decided that the declaration was insufficient, and judgment was rendered for the defendants.

For the defendants below these points are made: 1st. That the stipulations of the company make a defeasance, and according to the declaration, Lucas is owner of the property, discharged of his covenant, and does not appear that he has waived his right under the defeasance. 2d. That unless a waiver of the forfeiture is shown by an averment of an offer to convey, the covenant of Lucas is discharged, and so the others are discharged. 3d. That if the instrument is regarded as containing material covenants, without regarding any forfeiture, then the order of time in which the acts are to be performed is to be ascertained by the character of the acts themselves, and the interest of the parties. 4th. Here the acts of the company are to be secured by a deed of trust, to be given simultaneously with the execution of the notes, and this necessarily supposes that Lucas will have before executed, or will then execute, the deed to the company, so that the acts upon both sides were to be performed at the same time, and, if so, Lucas must aver an offer to perform on his part, before he can recover; which is not done here.

It is provided in the deed that interest shall be paid annually from the date of the deed; and the defendants with a laudible integrity, have not left us to ascertain by the character of the acts themselves and the interest of the parties, the order of time in which the acts are to be performed, but they have declared that, "It is the express understanding and agreement of the parties hereunto, that the said John B. C. Lucas shall be allowed thirty days within which to execute and deliver said deed of conveyance after he shall be thereunto required in writing, nor shall he be bound to deliver

such deed or conveyance at any time, unless the said corporation, or trustees to whom such conveyance is required to be made, being by said company duly authorised for that purpose, shall assure him a number of shares in the capital stock of said company, amounting in the whole to ten thousand dollars, as a part consideration of said conveyance; and shall also execute and deliver to the said John B. C. Lucas their promissory notes for the residue of the consideration money, payable at the times and in the manner in the said recited agreement specified; also a covenant binding the said company, or corporation, to erect the said hotel on the lots so to be conveyed, to commence the same on or before the first day of April next, and to complete the same without unnecessary delay, together with a deed of trust to each person or persons as shall be named by said Lucas, to secure the payment of the consideration money, according to the tenor and effect of the promissory notes so to be executed, and the performance of the covenants, &c." The defendants, it is averred in the declaration, did in due time enter upon and take possession of the said half square of ground, and do all other things convenient to advance their own immediate interests, but utterly neglected to do any one of the things they were by their agreement bound to do towards securing to the plaintiff payment of the purchase money of the ground; and they gravely say, that according to the declaration Lucas is the owner of the property, and that unless a waiver of defeasance is shown in the declaration by an avowment of an offer to convey, the covenant of Lucas is discharged, and so the others are discharged. To this, it may be replied, that they bound themselves unconditionally by their agreement to pay interest from the date thereof, annually and to perform all things required by this agreement of theirs to be done before he could be required to convey; and as he has not chosen to consider their neglect to comply with their contract, as amounting to forfeiture, it is not easy to conceive with what propriety they can claim any advantage from the wrong done by themselves to him. But if the construction of the agreement contended for is given, Lucas is still entitled to interest on the purchase money from

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Clemens and
others.

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Where parties mutually covenant, the one to convey, and the other to perform certain acts as the consideration of the conveyance, the failure of either to perform his part of the covenant gives a right of action to the other on the covenant, although such failure may work a forfeiture of the rights of one of the parties, for the other may waive such forfeiture.

the date of that instrument, 3rd November, 1836, till the first of April 1837, when they had agreed to execute their notes for purchase money and interest. So, according to the construction of the instrument by the defendants themselves, the declaration ought to have been held to be sufficient. It is not necessary to say what might have been the opinion of this court on the merits of the demand of interest from the date of the agreement till the first of April thereafter, if the defendants had pleaded an offer in due time to execute their part of the agreement, and a refusal or neglect of Lucas to perform his part. It seems to be, however, enough, that he who, by the express terms of the agreement, was not bound to convey till they tendered a performance of their part of the agreement, has not chosen to consider their omissions as a forfeiture of their rights. The construction given by the defendants is very convenient to their own interests. The interest which they have promised to pay, is moderate, and they retain that very moderate interest from year to year, without paying interest on it. In the mean time, it is not probable that they have neglected to file for record the agreement; indeed, that would be useless, for even if he were disposed to sell the ground to any other person, it would be almost impossible to find a purchaser unaffected by notice of the previous contract with this company. So they have nothing to do but sit idle in the enjoyment of his property and the interest on the purchase money, confident that a court of chancery will at any time when invoked, decree to them a conveyance of premises on payment of interest and further compliance with their contract. In my opinion, the action of covenant well lies on this instrument of writing for damages sustained by Lucas in consequence of the neglect of the defendants to perform their part of the contract, and that the interest on the purchase money, from the date of the writing till the commencement of the action, is the proper measure of damages.

The judgment of the circuit court is reversed, and the cause remanded.

SMALL, adm'r. of GILLEY, dec'd. v. HEMPSTEAD.

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This court will presume the judgment of the inferior court to be correct,
unless it is shown to be otherwise.

Small
v.
Hempstead.

Error to the St. Louis Circuit Court.

GEYER for Plaintiff in Error.

SPALDING for Defendant in Error.

Opinion of the Court, delivered by Scott, Judge.

On the 10th day of August, 1825, Charles S. Hempstead obtained judgment against John B. Gilley, by proceedings on an attachment. Afterwards, in July, 1837, David Small, administrator of John B. Gilley, dec. filed his motion to set aside the judgment, for irregularity apparent on the face of the proceedings. This motion was overruled and the cause is brought here by writ of error. No exception was taken and preserved, to the judgment of the court in overruling the motion. This court will presume the judgment of the inferior court to be correct, unless it is shown to be otherwise.

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be otherwise.

The appearance of the defendant in error to the motion to set aside the judgment for irregularity, was no admission of the representative character of the appellant. As the objections to the motion were made on terms, and were not required to be entered of record, it cannot be discovered on what ground the motion was overruled. For ought that appears, it may have been done because the right of the appellant to make it was not established.

Writ dismissed.

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BURDYNE V. MACKEY, Executrix of MACKAY.

Burdyné
v.
Mackey, Ex.

1. An executor or administrator, as such, cannot maintain an action of ejectment for lands of which his testator or intestate died seized.
2. If an executor or administrator brings suit in his representative capacity, he cannot recover by virtue of any individual interest he may have in the matter in controversy.

Error to the St. Charles Circuit Court.

CAMPBELL for Plaintiff in Error.

BATES for Defendant in Error.

Opinion of the Court, delivered by Scott, Judge.

J. Mackey as executrix of James Mackey, deceased, instituted an action of ejectment in the St. Charles circuit court against Amos Burdysne, who, it was proved, was in possession of the tract of land in controversy. Mackey obtained a verdict and judgment below, and the cause is brought here by writ of error. James Mackey, it seems, claimed a large tract of land, partly situated in St. Charles county, by virtue of a Spanish concession and survey, of which the lot in dispute is a parcel. This claim was presented to the first board of commissioners appointed to determine the validity of French and Spanish claims to land in the then District of Louisiana, now State of Missouri, and was rejected; afterwards it was reported for confirmation by the board of commissioners created by an act of congress of July 9th, 1832, and was confirmed by a law of the 4th July, 1836, to James Mackey, or his legal representatives. During the interval between the first rejection and the ultimate confirmation of this claim in 1822, James Mackey departed this life, leaving a will, dated 16th March, 1822, by which, after some special bequests, he devised his lands to his wife, J. Mackey, the defendant in error, and his seven children, to be equally divided among them; and conferred on his wife a control of the land devised to his children, until they should marry, or attain the age of twenty-one years. Under the will, letters

testamentary were granted to J. Mackey and Antoine Sou-
lard, the executrix and executor named in the same. This
suit was commenced by J. Mackey, as surviving executrix
of the last will and testament of James Mackey, deceased.
Burdyne, the defendant, attempted to show an outstanding
title in others, by the production of evidence of a grant of the
same land to one Clamorgan, by lieutenant governor Tru-
deau; and also relied on the length of his possession, which
commenced, as it appears from the evidence, in the year 1816.

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The principal question arising from the facts here set forth
and presented to the court for its determination, is, whether
an executor or administrator, *as such*, can maintain an action
of ejectment for lands of which his testator or intestate died
seized: or, in other words, whether, upon the death of an
individual, the lands of which he was seized will descend to
his executor or administrator, or to his heirs? It is not pre-
tended that such a claim for the executor or administrator
has any countenance from the common law. By that law
the executor or administrator was only entrusted with the
personal estate. This included leases of terms of years;
and for them he might maintain an ejectment: But the exe-
cutor or administrator, as such, had nothing to do with free-
hold estates. This right must be derived from statute, and
it must be supposed that such an innovation, so much at war
with the opinion of all those instructed in the science of the
common law, the introduction of which into our code must
unsettle and disturb so many principles heretofore establish-
ed, should derive its existence, not from mere implication, but
from express enactment. Reference has been made to laws
which regulate the administration of the real estate of a de-
ceased person, at a period prior to the introduction of the
common law into this State, in order to lay some founda-
tion for the right of the executor or administrator to main-
tain an ejectment. But it must be obvious, that since the
introduction of the common law, an event which took place
in the year 1816, this question must be determined by refer-
ence to its principles, and the statute laws now in force, and
not by any laws, usages, or customs which may have pre-
vailed here before that time. The phraseology of the sta-

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tute regulating descents, so far from favoring this right, is rather against it, as it casts the descent of the lands on the heirs, subject to the payment of debts. The provisions of the administration law, authorising the administrator to take possession of the title papers relating to lands, and requiring him to inventory the real estate, and give a bond, whose penalty shall cover both the personal and real estate, are not sufficient to warrant the implication that the title to the land vests in him. The lands of a deceased person may, under certain circumstances, be sold by the administrator or executor; hence, it would seem proper that his bond should cover the land, as the proceeds arising from the sale of it would go into his hands. The authority of the executor or administrator to lease the lands of the testator or intestate, under the direction of the county court, and to repair buildings, fences, &c., has been mostly relied on by the appellee, as sustaining her position. But is not the argument in favor of this power derived from these provisions, more than counterbalanced by the 11th section of the act concerning judgments and decrees, which declares that when the plaintiff in a judgment shall die, if it concern the personalty, it shall survive to his executors or administrators: if real estate, then it shall survive to his heirs or devisees. In this instance, the legislature seems to have had this matter before it, and its language is equivalent to an express declaration that on the death of an individual, his lands descend to his heirs, or pass to his devisees, and not to his executors or administrators. Again, has not the legislature in view the distinction between real and personal actions, in the second section of the fifth article of the act regulating practice at law, and does it not contemplate that the former shall be carried on by the heirs and devisees, and the latter by the executors and administrators, when it is declared that if "there is but one plaintiff in an action, and he shall die before final judgment, such action shall not be thereby abated, if it might be originally prosecuted by the heirs, devisees, executors, or administrators of such plaintiff, but such of them as might prosecute the same cause of action originally, may continue such suit upon the order of the court, substituting them as

plaintiffs therein?" It has well been asked, what interest in the land does the executor or administrator take? Is it a freehold estate, or is it less than a freehold? When does it determine? Is there any rule to ascertain its precise duration, or is it dependant on the varying circumstances of the administration of each individual's estate? We cannot but think so great an encroachment on the rules of the common law, must have an express legislative sanction, or an acquiescence in it must be rendered necessary, in order to give effect to plain and obvious legal enactments. No such necessity is conceived to exist, and it may well be questioned whether the convenience of prosecuting an action of ejectment in the name of the executor or administrator, is so much superior to the accustomed mode, as to countervail the objection to the introduction of a principle in our jurisprudence, whose consequences cannot be foreseen.

From the view we have taken of this subject, we do not deem it necessary to determine the question whether the lands confirmed to Mackey, or his legal representatives, by the act of July 4th, 1836, passed by his will, which was executed in 1822. Even admitting that the land did pass, yet as the appellee in her declaration has claimed the land *as executrix*, and has asserted her rights to the possession of it by virtue of her representative character, and no other, it would be a variance to permit her to recover as devisee or legal representative. 2 Starkie, 308. It is not intended by this to shake the authority of those cases in which it has been held that when the words executor or administrator are used as a mere description of the person, and may be rejected as surplusage, the plaintiff will be entitled to recover in his individual right, although he may be termed executor or administrator in the declaration. In the case before the court, the appellee has placed her right of recovery on the ground of her bearing the character of executrix, and failing to sustain the right asserted, it would operate as a surprise if she were permitted to turn round and claim the land on another and a different right. The case of Bagnell et al. v. Broderick, (13 Peters,) has been relied on as an authority supporting a contrary doctrine. That action was

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If an executor or administrator brings suit in his representative capacity, he cannot recover by virtue of any individual interest he may have in the matter in controversy.

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commenced against Bagnell, and afterwards Morgan Byne, on motion, was made a co-defendant. Byne died, and his executors were substituted as defendants. A judgment *de bonis propriis* was rendered against the executors, and it was assigned for error. It is clear, the question of a variance did not and could not arise; and that case is unlike the one now under consideration. A plaintiff in ejectment must recover on the title set forth in his declaration. The defendant, however, is not confined to any one defence, but under the plea of not guilty, may show any thing to defeat the plaintiff's action, and if he is foiled in one defence he may resort to another. The court says, "the executors of Morgan Byne had no interest in the land by virtue of their letters testamentary, but could well have an interest by the will of their testator. On no other ground could they properly have been permitted to come in and defend in the character of executors."

The appellant did not insist on the outstanding title he attempted to set up, and nothing will be said in relation to it. As to the length of possession relied on by him, it will be borne in mind, that the legal title to the land was in the general government, and no possession, however long continued, would give a title against it. No laches nor neglect is imputable to the government, nor is it included in any statute of limitations, unless expressly named. If Mackey's claim was of a character, that it could not be asserted in a court of justice, and he was consequently without remedy under our laws, he would seem then to be in the situation of those against whose claims the courts of justice have been barred, during which time, it has been held, the statute of limitations does not run. *McIver v. Ragan*, 2 Whea.

Judgment reversed.

SETTLE & BACON v. THE ST. LOUIS PERPETUAL MARINE, MAY TERM.
FIRE AND LIFE INSURANCE COMPANY. 1842.

A departure from the usual course of the voyage of a steamboat, for the purpose of saving *property*, is a deviation which discharges the insurer.

Settle & Bacon
v.
St. Louis Perpetual Ins. Co.

Error to the St. Louis Circuit Court.

GEYER for Plaintiff.

SPALDING & TIFFANY for Defendants.

Opinion of the Court, delivered by Tompkins, Judge.

Settle and Bacon sued the insurance company in an action of covenant in the circuit court of St. Louis county, and that court having rendered a judgment against them, they prosecute this writ of error to reverse the judgment.

The action is founded on a policy of insurance, executed by the Perpetual Insurance Company to Settle and Bacon, the plaintiffs, as well in the original action as in the writ of error. The policy is in the usual form. The defendants pleaded, among other things not material to be herenoticed,

1st. That after the steamboat Rolla (on board of which were shipped the goods, to recover damages for the loss of which this action was brought,) had departed from New Orleans upon the voyage in the declaration mentioned, towards St. Louis, she was stopped and detained from continuing her said voyage, by the master, without any necessity therefor, &c.

2d. That she was stopped and detained, and employed for twenty-four hours, in transporting goods, &c., from the steamboat George Collier, then lying aground in the Mississippi, to the shore of said river.

To these pleas the plaintiffs reply, severally,

1st. That the steamboat Rolla was stopped and detained to relieve the George Collier, lying aground as above mentioned.

2d. That at the time there was, and for a long time had

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been, a general custom and usage in the navigation of steamboats and vessels in and upon the Mississippi river, that when any such steamboat or vessel engaged in the navigation of said river, and by any peril of the river aground, and in distress, and in great peril and danger of loss, for the master of any other steamboat and vessel, navigating such river, and passing near such steamboat or vessel in distress, to detain such steamboat or vessel, and to give relief to such steamboat or vessel so in distress, or peril, and for that purpose to employ such passing steamboat, or vessel, when necessary, in removing so much of the cargo of such steamboat or vessel in distress, as was necessary to be removed, in order to relieve such steamboat or vessel so in distress from such perilous condition, &c.

These two last replications then conclude with averments, that the Rolla was stopped and detained in relieving the George Collier, so in distress, &c.

To the two first replications to each of the above mentioned pleas, the defendants demurred; and rejoined to each of the second replications, that the usage and custom in such cases was to give relief to steamboats and vessels in distress, if the master of the boat or vessel in distress will pay, or agree to pay, to the owners of the passing boat such reward therefor as the master of such passing boat may think proper to demand; and without such agreement to pay, the usage or custom is to refuse to furnish the relief needed, &c.

To these rejoinders to the two second replications to the aforesaid pleas, the plaintiffs demurred. Judgment on all the demurrers was given for the defendants.

The question to be here decided is correctly stated by the counsel for the defendant in error to be this, viz: Whether the policy is avoided, or, in other words, whether it is a deviation, if a boat or vessel delay on her voyage to assist another boat or vessel in distress, when property only, and not life, is in danger. A deviation, say law writers, is a departure without necessity, or justifiable cause, from the usual course or line of the voyage. Hughes on Insurance, p. 139. And Phillips says, "A deviation is the increasing or varying of the risks insured against, without necessity, or

reasonable cause. See vol. 1st, p. 480. But when a de- MAY TERM.
 parture from the usual course of the voyage is occasioned 1842.
 by necessity, or by any imperative or urgent obligation, it Settle & Bacon
 is not regarded as a deviation, but is excused in law. See v.
 Hughes on Insurance, 150. Deviations for the purpose of St. Louis Per-
 succoring distress are justifiable; it is for the common ad- petual Ins. Co.
 vantage of all persons, underwriters and others, to give and
 to receive assistance to and from each other in distress. 6
 East, 54; Lawrence v. Sydebotham. To the same purpose,
 see 1 Phillips, 530, and authorities there cited. But it
 seems, says the same writer, on the next page, that delay,
 or going out of the course, to save property, is a deviation.
 Mr. Justice Washington says, "If the stoppage be continued,
 or the risk increased by adding to the cargo, or diminishing
 the crew, or by other means, for the purpose of saving the
 property found, I think the underwriters are discharged."
 The same is implied by Chief Justice Marshall, in giving the
 opinion of the court, where speaking of the salvage to be
 allowed to the the owners of a vessel which had saved an-
 other vessel and cargo, he says, "The same rewards ought to
 be extended to all, for a service designed to be encouraged;
 and it is surely no reward to a man, made his own insurer
 without his consent, to return him very little more than he
 had advanced."

The cases here referred to by Mr. Phillips, have been ex-
 amined, and are found to sustain him amply in what he says.
 But it is contended by the plaintiff in error that these are
 only dictas, and have not the force of a decision on the very
 point. It seems that although the occasion often occurred,
 few have been bold enough to bring an action against insur-
 ers in such a case. A case, however, cited by both parties
 in this cause, seems to be in point. It is the case of Law-
 rence and others v. Sydebotham, 6 East, 54. In this case
 it was decided, that "a policy of insurance on a ship, on a
 certain commercial voyage, giving leave to the assured to
 chase, capture, and make prizes, however it may warrant
 him in weighing anchor, while waiting at a place in the
 course of a commercial voyage insured, for the purpose of
 chasing an enemy who had before anchored at the same

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place in sight of him, and was then endeavoring to escape, will not warrant him, after the capture, and in the course of the further prosecution of the voyage, in shortening sail and laying to, in order to let the prize keep up with him, for the purpose of protecting her as a convoy into port, in order to have her condemned, though such port were within the voyage insured.

A departure from the usual course of the voyage of a steamboat, for the purpose of saving property, is a deviation which discharges the insurer.

In this case it was decided that the slackening sail for the purpose of convoying the prize, was a deviation which annulled the policy. In that case the plaintiff deviated to save his own property; in the case under consideration, the plaintiff deviated to save the property of another. Nothing seems more clear than that the salvage is to be considered as a compensation to those who aid in saving property endangered by the accidents of navigation, and as their reward both for their labor and for the loss of the premium paid to the underwriters. If we decide that the insured are at liberty to stop on the voyage, at the risk of the underwriters, to save all the property they may find in danger, we shall throw in their way many temptations to commit frauds. The judgment of the circuit court ought then, in my opinion, to be affirmed; and, the other members of the court concurring, it is affirmed.

EDWARDS and others v. THE ST. LOUIS PERPETUAL INSURANCE COMPANY.

Action of assumpsit on a policy of insurance stipulating that "*endorsements on this policy to be the evidence of property, at the risk of the company under the same.*" Held: That the insured could only recover where the endorsement on the policy was made previous to the loss.

Error to St. Louis Circuit Court.

GEYER & SKINKERS for Plaintiffs.

GAMBLE for Defendant.

Opinion of the Court, delivered by Napton, Judge.

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Insurance Co.

This was an action of assumpsit, on a policy of insurance. The defendant demurred to the declaration, and had judgment on that demurrer.

The policy declared on, was on "Shipments by good vessels and steamboats, for the period of six months from date, to wit : From St. Louis to port or ports on the western waters, and from the same to St. Louis, or from Atlantic ports, via New Orleans, to St. Louis. *Endorsements on this policy to be the evidence of property, at the risk of the company under the same.*"

The declaration averred a shipment within the time insured against, and a loss; and further averred, that they had received no invoice or bill of lading, and that they were not otherwise informed of the number, description, and value of the goods shipped and lost, before intelligence of the loss was communicated to them, and that they did not make endorsements on said policy of said goods, or the value thereof, before intelligence of the loss; but as soon thereafter as the plaintiffs could and did ascertain the description, &c., they offered to make the endorsements; which the defendants refused: of all which they had notice.

The only question is, whether the plaintiffs can recover for goods which were not endorsed on the policy: Whether the endorsement on the policy be a condition precedent to the plaintiffs' right to recover.

Policies of insurance are to be construed, like any other instrument, according to their sense and meaning, as collected from the terms of the contract. *Robertson v. French*, 4 East, 130. "The only difference," said Lord Ellenborough, in the case just cited, "between policies of insurance and other instruments, in this respect, is, that the greater part of the printed language of them being invariable and uniform, has acquired from use and practice a known and definite meaning, and that the words superadded in writing are entitled, *if there should be any reasonable doubt upon the sense and meaning of the whole*, to have a greater effect attributed

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to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula, adapted equally to their case and that of all other contracting parties, upon similar occasions and subjects."

In the case of Hannon and others v. Kingston, (3 Camp. N. P. R. 151,) where the assurance was on goods, "*as might be thereafter declared and valued*," it was held by Lord Ellenborough, that the declaration of interest was not a condition precedent, but that if no declaration was made and communicated to the underwriters before the loss, the policy was then open, and the insured was allowed to prove his interest on the trial.

The words "*thereafter to be declared and valued*," may be regarded, then, to have acquired from this and other cases, a fixed judicial interpretation; and if the words used in this policy are equivalent expressions, a similar interpretation would be authorised. The language of the policy now before the court is, "Endorsements on the policy to be the evidence of property, at the risk of the company." Can this language by fair construction, mean that the property and value may be declared after the loss, in any mode agreeable to the insured, and that the want of such declaration before loss, only converts the policy from a valued, into an open policy? The plain meaning of the stipulation is, that the declaration of *property* and of value must be made in a specific mode, to wit: by endorsements on the instrument containing the terms of the contract, and *in that way only*. Could that endorsement be made after the loss had happened? Of course not: the risk would be determined. The whole object of the endorsement would be defeated by such a construction.

The insertion of these *written terms* in the printed formulas of the insurance company, it is rational to suppose, was made by design, and to effect certain purposes, and cannot be supposed to have been a mere repetition of phrases substantially to be found in all open policies. No doubt, the great inconvenience attending open policies, both to the in-

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urers and insured, the liabilities to fraud on both sides, induced the insertion of this clause, for the mutual benefit of both parties. It was, in effect, making the policy a valued policy, to the amount endorsed.

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The case of Warseley v. Wood and others, (6 Term R. 711,) appears to be more in point. In that case, the printed proposal referred to by the policy, declared, that the company would not be accountable for losses by fire, caused by civil commotion, &c. And also, that persons sustaining any loss by fire, "should procure a certificate under the hands of ministers and church wardens, and of some respectable householders of the parish, not concerned in the loss, importing that they were acquainted with the character and circumstances of the person insured, and knew or believed, that he, by misfortune, and without any kind of fraud or evil practice, had sustained by such fire the loss and damage therein mentioned." The declaration stated a loss to the amount of £700; and that the plaintiff had procured and delivered to the company a certificate under the hands of four respectable householders of the parish, and had applied to the church wardens to sign the certificate, but that they, without any reasonable or probable cause, wrongfully and unjustly refused to sign it. The plaintiffs had judgment in the court of common pleas, (2 Hen. Black. 504,) but this judgment was reversed by the court of King's Bench, who unanimously held, that the procuring the certificate of the church wardens was a condition precedent to the right of the assured to recover; and that it was immaterial that the minister wrongfully refused to sign the certificate.

This case, it seems to me, is not distinguishable from the present. If there was any hardship or inconvenience in making the endorsements on the policy previous to the loss, it is the fault of the parties. They had the power to make their own terms. They have done so in language not easy to be misunderstood, and courts of law have no power to relieve the losing party from inconveniences or hardships attending his own contract.

Judgment affirmed.

could only recover where the endorsement on the policy was made previous to the loss.

Action of assumpsit on a policy of insurance stipulating that "endorsements on this policy to be the evidence of property, at the risk of the company under the same." Held: That the insured to the loss.

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DILLON V. CHOUTEAU.

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The admissions, of a party to the record, are admissible, though he has parted with all his interest in the suit. And his ceasing to be a party to the record, by death, before the admissions are offered in evidence, will not exclude them. Scott, Judge, dissenting.

Appeal from the St. Louis Circuit Court.

GAMBLE for Appellant.

SPALDING & TIFFANY for Appellee.

Opinion of the Court delivered by Tompkins, Judge.

On the 17th day of May, 1838, John P. Reilly and Henry Chouteau instituted a suit against Dillon, in the circuit court of St. Louis county. On the 9th day of January, 1840, the death of Reilly was suggested on the record, and afterwards at the same term, Chouteau obtained a judgment against Dillon, to reverse which, Dillon prosecutes this appeal. This state of facts appears on the record. Reilly and Chouteau had been partners in trade, and while that partnership continued Dillon had purchased goods and received money from them; and for the amount of such goods and money this suit was brought. Dillon and Reilly had previously been partners, and on the 25th day of June, 1836, that partnership being dissolved, Reilly, as principal, and Chouteau, as his security, made and delivered to Dillon a bond, reciting that, whereas said Dillon and Reilly had that day executed an article of dissolution of partnership, wherein said Reilly had covenanted that he would give bond and security to said Dillon, to save him harmless from the liabilities and demands against the said firm of Dillon and Reilly; therefore, for the purpose of complying with the said covenant, they, as principal and security as aforesaid, covenanted with Dillon that Reilly should pay all demands against, and liabilities for such firm, &c.

On the same day that Dillon and Reilly dissolved partnership, Chouteau and Reilly became partners; and on the

27th day of May, 1837, they dissolved that partnership, and Reilly transferred to Chouteau all the debts, effects, and property of the firm of Reilly and Chouteau.

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Reilly afterwards gave Dillon the following certificate: "October 13th, 1837. I state that the merchandise and cash charged to the account of Patrick M. Dillon, on the books of Reilly and Chouteau, were furnished to said Dillon, subject to the settlement of the affairs of the copartnership formerly existing betwixt said Dillon and myself, under the firm of Reilly and Dillon. If on such settlement it should appear that I am not indebted to him as a partner of Reilly and Dillon, then he will owe the amount of his said account to Reilly and Chouteau." This was the understanding of all parties in relation to the said accounts, and was that upon which it was created, and is the better understood from the fact that Mr. Chouteau came into the establishment in the place of Mr. Dillon, who retired from the business.

Chouteau, as above stated, commenced his suit against Dillon in the name of Reilly and Chouteau, in the month of May, 1838, after the date of the above certificate: and the certificate was dated after the dissolution of the partnership of Reilly and Chouteau. Dillon offered the certificate in evidence, and the court excluded it, and Dillon excepted to the decision of the court. Was the certificate properly excluded? In 2 Starkie, p. 22, it is stated that the admission of a party on the record is always evidence, although he be but trustee for another, and although it appear from the admission itself that he is such. To the same purpose see also Boerman v. Radenius, 7th Term Rep. 633. It may be added, that it was in Chouteau a voluntary act to purchase the interest of Reilly in the partnership goods, and it does not therefore seem to be at all unjust that the admissions of Reilly should be read in evidence against him. He had moreover become security for Reilly that Dillon should lose nothing by his neglect to settle the affairs of Reilly and Dillon: and from the evidence detailed in the record, it would seem not improbable that if the firm of Reilly and Dillon was not indebted to Dillon, Chouteau had in his power the means to prove it. Reilly is, moreover, in the situation of a wit-

The admissions of a party to the record are admissible, though he has parted with all his interest in the suit; and his ceasing to be a party to the record, by death, before the admissions are offered in evidence, will not exclude them.

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ness who by his testimony makes himself liable to the unsuccessful party, and his interest may be regarded as balanced betwixt the plaintiff and the defendant. Because the certificate of Reilly offered in evidence by Dillon was rejected, the judgment of the circuit court ought, in my opinion, to be reversed, and judge Napton concurring, it is reversed.

Opinion of Napton, Judge.

The doctrine of Lord Kenyon, in *Boerman v. Radenius*, has not been shaken by the authority of *Frere v. Evertson*; the latter case is unsupported by authority. The court of New York declare the case clearly distinguishable from that of *Boerman v. Radenius*, but do not specify any particulars by which to distinguish it. In *Boerman v. Radenius* it was held to be an incontrovertible rule, that the admissions of a plaintiff on the record are admissible evidence. So in *Craib and wife v. D'Aeth*, (cited 7 T. R. p. 670,) in an action by the obligee of a bond, Lord Loughborough admitted in evidence an affidavit of the obligee, who was plaintiff on the record, sworn by him after he had assigned the bond, in which the facts were recited on which the defendant relied.

But the rule in *Boerman v. Radenius* is a rule *stricti juris*, and courts would not be disposed to extend its operation. In the case now under consideration, Reilly was not a party to the record when his admissions were offered to be read; but the event which takes him off the record, takes him from existence: and by the intervention of another principle, still makes his admissions the best evidence which could be obtained. The only reason why Reilly's admissions were evidence was that he was a party to the record, and could not therefore be examined: his ceasing to be a party to the record, unless it enables the defendant to get his testimony, should not place the defendant in a worse condition than he was before. I therefore concur with judge Tompkins in reversing the judgment.

Scott, Judge, dissenting.

I do not concur in the opinion given. It appears that be-

fore the admission contained in the certificate given by Reilly was made, he had transferred all his interest in the chose in action on which suit was brought, to Chouteau. It is a clear principle, that after a party has conveyed away his interest in property, declarations made by him subsequent to the sale, are not admissible in evidence to affect the rights of his vendee. *Frere v. Evertson*, 20 J. R. Courts of law take notice of the person who is really interested in a chose in action, and the beneficial interest vested in the assignee are so far regarded that it is allowed to set off a debt due from the assignee in the same manner as if action had been brought in his name. I do not hold that the case of *Boerman v. Radenius*, 7th Term R. is applicable. That case asserts the principle that the admissions of a party to the record, although he is a mere nominal party, are in every instance evidence against him, and those who use his name in suing. The certificate of Reilly offered in evidence was made before he was a party to the suit, and he was no longer a party when it was offered. He had died, and the suit as to him had abated, before the trial. The costs as to him died with him. 12 J. R., 500. He then had no interest in the record. The principle above stated intervened, and prevented his declarations affecting the interests of his assignee from being given in evidence.

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KING, adm'r. of KING, et al. v. WOOD.

A proposition in writing, accepted by the other party, to sell "all that piece of property known as the *Union Hotel Property*," held not to be a sufficient description of the property to take the case out of the operation of the statute of frauds, it being uncertain what property was comprehended in the words "*Union Hotel Property*," without resorting to parol testimony.

Appeal from St. Louis Circuit Court.

GEYER, SKINKERS, & KING, for Appellant.

SPALDING for Appellee.

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Opinion of the Court, delivered by Tompkins, Judge.

William B. King, in his life time, filed his bill in the circuit court of St. Louis county, sitting as a court of chancery, praying that James Wood be decreed to perform a contract, which the complainant alleged had been entered into by Wood with said complainant. After the filing of the bill the complainant died, and the suit proceeded in the name of William W. King and others, heirs and legal representatives of the complainant. The circuit court dismissed the bill, and to reverse its decree this appeal is prosecuted.

It is stated in the bill that James Wood, of Pittsburg, in Pennsylvania, being siezed in fee of a certain real estate in the city and county of St. Louis, "called the Union Hotel Property, consisting of two lots or parcels of ground, with buildings or improvements thereon, one of which lots contains sixty-nine feet on Main street, in said city, by one hundred and fifty feet in depth, more or less, bounded east by Main street; south, by Prune street; West, by an alley twenty feet wide, which separates the same from the lot next described; north, by a line parallel to said Prune street, and distant therefrom sixty-nine feet; on which lot there are large brick buildings, now occupied as the Union Hotel. The other lot fronting fifty feet on Second street, and running eastwardly one hundred and fifty feet, by that width, more or less, bounded east by the above mentioned alley; south, by Prune street; west, by Second street; north, by a line parallel to Prune street, and distant therefrom fifty feet; the said two lots being the same property conveyed by Scott and Rule to the said Wood in the year 1831. And that said Wood being desirous to sell the said lots and premises, in the month of November, in the year 1835, entered into a correspondence and negotiation with the complainant touching the absolute sale and conveyance of said property to said complainant; and that on the third day of December, in that year, said Wood proposed in writing, signed by himself, to sell to the complainant the above described lots and premises, or all that piece of property known

by the name and description of the Union Hotel, for thirty thousand dollars ; of which five thousand dollars was to be paid on the first day of April then next, at which time said Wood was to make the conveyance ; and the remaining twenty-five thousand in six annual instalments, &c. And the complainant was required to inform Wood before the first day of February then next, whether he would accede to the said proposition. But the complainant did give Wood notice accordingly of his acceptance of the proposition, and therefore it was agreed betwixt the complainant and Wood, that Wood should convey said property on the terms above mentioned ; and that Wood should be in the city of St. Louis on the first day of April then next, at which time each party should perform his part of the contract."

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The statement of the case is concluded by averring the complainant's readiness and offer to perform his part of the contract, and the neglect of Wood to perform his part. The complainant makes a letter from Wood to him an exhibit in the cause, and a part of his bill of complaint.

The letter is in the words following :

"PITTSBURG, Dec. 3d, 1835.

Mr. Wm. B. King,

Sir : In reply to your proposition to rent part of my property in St. Louis, I have to inform you that I will agree to rent the premises at present occupied by Farish, and known as the Union Hotel, together with the brick warehouse occupied by Varin & Reel, for the term of five years, commencing on the first day of April next, (provided Farish, the present occupant of the premises, can be ejected in time to give you possession,) for which I will require you to pay the yearly rent of \$1800, to be paid quarterly, and for the punctual payment of said rent, I will hold all the furniture and personal property on the premises bound as security for the same. I will agree to appropriate one thousand dollars of the first year's rent for the purpose of converting the brick warehouse into a dining room, and for such other repairs as may be necessary and property. In

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reply to your proposition to purchase, I have to state that I will sell all that piece of property known as the Union Hotel property, for thirty thousand dollars; five thousand dollars of which to be paid on the first day of next April, at which time I will make the conveyance, and the remaining twenty-five thousand dollars to be paid in six equal annual payments, with interest from the date, at the rate of six per cent. per year; the payment to be secured by bond and mortgage on the property. You will advise me before the first day of next February, whether you will accept either of the above propositions, as I will not consider myself bound by either, unless you give your decision before that time, &c."

Wood, the defendant, answered, admitting the letter to be written by him; and that in December, 1835, a person calling himself the son of William B. King, the complainant, came to him at Pittsburg, and proposed to hire or buy the Union Hotel property in St. Louis, which the defendant owned, and which was occupied by said Farish as tenant: that said person represented to the defendant that his father, or that his father and himself, using the personal pronoun "*we*," kept a hotel in the city of St. Louis; that for that reason they would like to buy said property, if they could, and the defendant would give them time enough, and such terms as they could comply with; and that he replied that he did not wish to sell; that he had not been in St. Louis for a year, and did not know the value of property, nor whether it had risen. The said son of the complainant then said to him, that vacant lots in St. Louis had risen, but that improved property had not risen in St. Louis; that he could buy the Missouri Hotel property, lying on the said square, for \$16,000, and that, relying on that representation, he had written the letter mentioned in the bill of complaint. He says that the Union Hotel property means the lot first in the bill mentioned, and not the secondly therein mentioned, never having been a part of the premises leased with the said hotel, except a privy, on the east end thereof, and always leased to other persons, and for other purposes than for the use of the hotel, to wit, for warehouses. He states that in

March, 1836, he came to St. Louis, and found property had risen at the time the conversation was had by him with the son of the complainant, and that he had been induced by the representation of said son of the complainant to offer said property at a reduced price. He admits that while he was at St. Louis the complainant requested him to convey the property to him, and that he declined doing so for the reasons above given. He insists that there is no sufficient memorandum, or note in writing, of said agreement set out in the bill of complaint. He denies that he ever made any promise in writing to convey said property, save that made in said letter, and insists that the proposal made in said letter was not accepted, but on the contrary, new terms were proposed by the complainant, besides those contained in the defendant's letter, to wit, that the property sold should be both of the lots mentioned in the bill of complaint, whereas said letter included only one of them, and the said complainant's acceptance of the proposals was only on condition that both of the said lots was to be conveyed, and the complainant had so instructed his son, and required him not to accept the proposals as set forth in the said letter of the defendant, but to require said second lot to be included in the bargain, otherwise to refuse to accede to the proposals. He also insists that the said bargain, set forth in the bill of complaint, was never completed and concluded in such a manner as to be binding on the parties, or either of them, but on the contrary that all the assurances made by the defendant, whether by letter or oral, were considered by the complainant not as the conclusion of a bargain, but as the terms proposed of a pending treaty, and that in fact they were such only.

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The complainants gave in evidence the deposition of William W. King, now become one of the complainants by the death of his father, the original complainant.

This deposition, taken before the deponent became a party to the record, is as follows :

That about the 18th November, 1835, he left St. Louis for Pittsburg, and arrived there about the 1st day of December, his only business being to see Mr. Wood, the defendant, about renting or purchasing the Union Hotel pro-

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perty. He saw Wood the same day he arrived, and told him his business, and also told him to think of the matter, and to call on the deponent that evening at the Exchange Hotel. Wood came at the appointed time, and after some conversation stated his terms to the deponent, who was agent to William B. King, the complainant. The terms were, that he would rent the house as used by Farish, as well as the warehouse now occupied by Garvey, to be used as a dining room; in short, the whole house, except the two stores on Main street, and the lot rented by Varin & Reel, for the rent of eighteen hundred dollars, and allow one thousand dollars of the first year's rent to be applied to the repairing of the house generally; or that he would sell to the deponent's father the Union Hotel property, minutely describing the same, as the deponent did not then know the exact situation of the whole property, supposing it ran the same width back to Church, or Second, street, as it was on Main street. This impression Wood corrected, drawing on paper the form of the lots, and stating the number of feet contained in each front; that on Main street being about seventy feet, that on Church street about forty-three feet. This property he said he had bought from Scott and Rule. He complained that it had brought him but a poor interest, the rents having been badly paid on the part of the hotel, and that he would rather have the hotel shut up.

He stated that Mr. Page, his agent, had rented to Varin and Reel the lot on Church street for a small sum of money, and therefore he would take for the Union Hotel property, as there described, the sum of thirty thousand dollars; five thousand dollars down, and the rest in six annual instalments, bearing interest at six per cent., and a mortgage on the premises to secure the latter payments and interest. The deponent then, as agent for his father, drew up an article to be signed by Wood and the deponent; Wood did not sign it, on the ground of its interfering with the lease of the lot on Church street to Varin and Reel, and the statement had no clause making the sale subject to the said lease. Wood then said he would bring the defendant a written proposition for his father's inspection, and allow him sufficient time

to give an answer ; which he did on the third of December, MAY TERM.
saying, in case the deponent's father agreed with either pro- 1842.
position, he, Wood, would comply. Deponent then "*left* King, Adm'r.
for Weeling," from whence he wrote his father two letters v.
containing an exact copy of Wood's contract, and a plat of Wood.
the property, as he obtained it from Wood ; which plat
agrees very nearly with the exact situation of the property.
Deponent returned about the first of January, when he
received two letters from his father, directing him, in case
it was fully understood to embrace the whole property from
Main to Church street, or to that effect, and that it was
Wood's intention to convey the same as thus described, to
notify Wood of the acceptance of his proposition, and that
he would take the property. This being expressly under-
stood by deponent from Wood's own description and draw-
ing of the same on paper.

The deponent then goes on to state, that he communica-
ted his father's acceptance of the proposition to Wood. His
own words are : Deponent then told him he had received by
letter positive instructions to close the contract, according to
the propositions contained in his letter to the deponent's fa-
ther under date of the 3d of December, 1836, to which he
agreed, and said it was all right, and that he would make the
conveyance accordingly. Wood refused to enter into any
further written agreement, saying that he was sufficiently
bound, more so than the deponent's father, who might or
might not take the property ; and that if the sum of five
thousand dollars were paid to him before the first day of
April next, (before which time he would be in St. Louis,) he
would execute the conveyance ; and would execute such a
conveyance as he had received from Scott and Rule. The
deponent denied that he had ever made any false represen-
tations to Wood about the value of the property.

Two letters written by the complainant to the witness on
the subject, are as follows :

"I this day wrote to James Wood to know of him if he
intended to let the narrow slip running from Union Hotel
to Church street ; on said strip Varin & Reel have a frame
warehouse, as in the copy of his letter sent to me by you,

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he only sells the Union Hotel; says nothing about the other part; and if he will let the whole go, I will take it, otherwise I will have nothing to do with it, as it is out of order, and no ground to have a yard, even to put coal or wood in, and it will take five thousand dollars to put it in order, in place of one. I have requested Wood to write by return mail, so I may inform you what to do. You had better see him first. Examine his letter, and you will find I am right in his not selling the point running to Church street, whatever your understanding may be; it is not in his letter, if you have sent me a true copy. Now, if he will convey all, you may give him notice that I will take it. The two pieces of ground are separated by an alley. Farish does hold about twenty feet for the use of the hotel, on which is the back-house, but this only joins Reel's warehouse, and belongs to that lot. This strip is one hundred and fifty by thirty odd feet, covered altogether by Varin & Reel's warehouse, which is frame, and Wood speaks of a brick warehouse, which is the lower apartment of the wing of the front building, (say hotel,) &c."

The complainant's second letter to the witness is as follows:

"December 19th, 1835. I wrote to Wood to know if he intended to include all the ground running from Main street to Church, as his letter does not say that he will sell all the property, but only says, that he will sell the Union Hotel property. This letter I wrote the day before I received it. I went to the office and took out the letter written to Wood. Your last letter says, Wood agrees to sell all the ground and houses, from Main street to Church. Now if this is your understanding, and Wood will convey all the ground he owns there from Main to Church street, you are authorised to notify him that I will take it; but if he will not include the strip from the alley to Church street, I will not take the other. I will not rent the other on any terms. One thousand will not do to put it in order, and the rent is too high, &c.

To this letter is subjoined a diagram of the lots, as sent by the witness to the complainant, and on the longest side

thereof are written these words: "If Wood will convey all this, I will take it. Make it secure by an agreement." MAY TERM.
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Several witnesses, interrogated on the part of the complainant, state that thirty thousand dollars was, at the time the complainant sent his son to see Wood on the subject of the purchase, to wit, in November, 1835, a fair price for all the property which the complainant demands in his bill, and that property such as that, did not rise in value much till some time in the year 1836, and one of the witnesses says that property was at that time in rather a depressed state. King, Adm'r.
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Several witnesses on the part of the defendant testify that unimproved property rose very rapidly in value in the latter part of 1835; and Page says, that there was at that time a general rise in the value of property in the city. He says he thinks that the Union Hotel property, comprehending the lot fronting on Main street, and running through to Church, or Second street, was then worth much more than thirty thousand dollars. This property partook of the general rise of property in 1835, but he did not think that the lot fronting on Main street partook so largely as some others in the neighborhood, "*on account of there being a hotel on it.*"

The points made by the defendant, resisting the decree of the circuit court are:

1st. That false representations were made by William W. King, the agent of the complainant, that caused him to sign the letter which he wrote to the complainant, and that consequently inadequacy of price resulted from the proposal to take \$30,000 for the property.

The second point, as alleged in the answer, is that there was no sufficient note in writing, of the said agreement, charged in the bill of complaint, so as to take the case out of the statute of frauds.

The third point there made is, that the terms of the defendant, as stated in his letter, never were accepted by the complainant, King, and that the whole matter was nothing more than a negotiation, which was never closed.

These points are copied from the brief the plaintiff in error, and as they appear to me to comprehend every thing material in the cause, I shall review them.

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The third point appears to me to be plainly in favor of the complainant. Two witnesses, to wit, William R. King and Madison Miller, testify positively that they did in due time inform Wood, the defendant and appellee, that the complainant accepted his proposition for the sale of the Union Hotel property; while John McKee, a witness of the defendant, states that in December, 1835, he passed through St. Louis, going to Pittsburg, and that while he was at St. Louis, King, the complainant, proposed to him either to join in the purchase of the property, or to purchase it himself, and rent it to the complainant. The witness stated that he refused to do either; and that some weeks after his arrival at Pittsburg, sometime early, he thinks, in February, he received from the complainant a letter, "Requesting him to say to James Wood, the defendant, that he, King, would take the tavern house and lot in St. Louis, at the sum of \$30,000, but that he would not make the first payment, to wit, five thousand dollars in cash, which, the witness understood from the complainant, the defendant required in hand, but made other propositions, not material to be here noticed. The statements of the witnesses of the complainant are not irreconcilable with those of McKee. He stated from recollection only the time at which he received this letter, early in February; he did not have the letter in his possession, and might not have been accurate in the recollection of the time; or this letter, even if written earlier than that to William W. King, might have been accidentally delayed after it was mailed.

On the first point made by the defendant as above stated, it is enough to say, that statements of the witnesses on each side about the value of property when the younger King left St. Louis to go to Pittsburg to purchase this property, differ from each other so much, that the witness King, when he made propositions to Wood, as agent for the complainant, ought, in my opinion, to be acquitted of the charge of making false representations to deceive Wood, the defendant.

We are then brought to the second point. The letter written by Wood to the complainant, and signed by Wood, is a sufficient note in writing to charge the defendant, and

make him liable to convey, under a decree of a court of equity, the Union Hotel property ; this is not denied by the defendant's counsel, and I consider the matter so plain, that I shall not refer to any of the authorities cited by the counsel for the appellants.

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But it still remains to be determined what is to be considered as embraced in the phrase "Union Hotel property." William W. King, a witness on the part of the complainant, asserts very positively (as it is above stated,) that Wood distinctly declared to him that he understood thereby all the property demanded in the complainant's bill of complaint, and furnished him a diagram of that property ; and Wood, in his answer, denies that he included in the property mentioned in his letter to King, the whole of the property demanded in the bill of complaint, and says that the "Union Hotel property," means the lot first in the bill mentioned, and not the lot secondly therein mentioned."

A witness examined on the part of the complainant, was asked if he was acquainted with the "Union Hotel property," in St. Louis, heretofore belonging to James Wood, and if so, to state what it is, and whether he had any negotiations about purchasing the same, &c. This witness stated that in his negotiations he included all the property of the Union Hotel from Main street back to Church, or Second, but failed to state what was understood to be the Union Hotel property. None of the witnesses testified as to what was generally understood to be included in the property called the "Union Hotel property."

It is contended by Mr. King, on the part, of the complainants, that Wood, in his letter to the complainant, furnishes strong evidence that by the term "Union Hotel property," he meant the whole of the property extending from Main to Second street, as claimed in the complainant's bill of complaint, and that this evidence thus furnished by Wood himself, connected with the testimony of William W. King, ought to prevail over the denial of Wood, contained in his answer. Wood's letter, he says, contained a proposition to rent a part of the Union Hotel property, and also another proposition to sell the whole, and contends that Wood in-

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tended to rent the part east of the alley, and to sell all the property comprehended betwixt the two streets, as demanded in the bill. The letter of Wood to the complainant shows on its face that it was written in answer to one of King's on the same subject. In the beginning of the letter he says, "In reply to your proposition to rent part of my property in St. Louis, I have to inform you that I will agree to rent the premises at present occupied by Farish, and known as the Union Hotel, together with the brick warehouse occupied by Varin & Reel." And then he makes a proposition to allow \$1000 to defray the expenses of fitting that warehouse for a dining room.

In the latter part of his letter Wood says, "In reply to your proposition to purchase, I have to state that I will agree to sell all that piece of property, known as the Union Hotel property, &c."

Wood, in this letter, evidently makes a distinction betwixt the terms "Union Hotel" and "Union Hotel property." By the Union Hotel, he means the part occupied by Farish only, and therefore he proposes to annex to the hotel the part occupied by Varin & Reel, as a warehouse, for a dining room. This brick warehouse appears from the evidence to be a wing of the building called the Union Hotel, and it is to be presumed that the complainant did not propose to rent that part.

Woods, then, when he proposed to sell, consistently enough designates it thus : "I will agree to sell all that piece of property known as the Union Hotel property," &c. without going into a minute detail of it as he had done when he proposed to rent. In the proposition to rent, it was necessary to enter into detail, in order to let the complainant know that he offered to rent him a part not before occupied as part of the tavern. In the proposition to sell, he uses the general terms, all that piece of property, &c. It could not be presumed that the complainant would wish to purchase or the defendant to sell a part of the house. This seems to me to be a very reasonable construction of the letter of Wood to the complainant; and this also is the construction that must have been put on that letter by the complainant him-

self; for, in a letter written to William W. King, the witness above mentioned, after the receipt of Wood's letter, he says, "examine his letter, and you will find I am right, in not selling the part running to Church street, whatever your understanding may be, it is not in his letter, if you have sent me a true copy." The complainant, it is evident, lived in St. Louis and kept a public house, and must be supposed to know as well as any body what property was generally understood to be comprehended in the term Union Hotel property; and if we could not from the context of the defendant's letter to him understand its meaning, yet still the complainant's exposition ought to be taken in preference to that of any other person, as it is against the claim here set up. But in my opinion, Wood sufficiently shows on the face of his own letter that he offered to sell to the complainant only so much of the property demanded as lay east of the alley; and as the complainant, when it most interested him, understood that letter correctly, and when he was most apt to express that understanding candidly, did declare that he so understood him, I feel still more assured that such was the meaning and intention of Wood as expressed in that letter.

There was then, in my opinion, no note or memorandum in writing made by Wood, on which the complainants can have a decree against Wood to convey to them the property in this bill demanded.

The complainants deny that they ever assented to purchase the property lying east of the alley on the terms set forth in the bill of complaint, and this being all that Wood, as it seems to me, assented by his letter to sell, the judgment of the circuit court dismissing the bill must be affirmed.

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A proposition in writing, accepted by the other party, to sell "all that piece of property known as the Union Hotel property," held not to be a sufficient description of the property to take the case out of the operation of the statute of frauds, it being uncertain what property was comprehended in the words "Union Hotel property," without resorting to parol testimony.

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1842.

MAUPIN & JAMESON, impleaded with BOON, v. SMITH.

Maupin & Jameson, imp'd.
with Boon,
v.
Smith.

In suit by assignee of a note payable "without defalcation," but not negotiable like an inland bill of exchange, for want of the words "negotiable and payable," the payor cannot plead a set-off, though he may plead a total failure of consideration.

Error to Franklin Circuit Court.

POLK for Defendant.

Opinion of the Court, delivered by Scott, Judge.

William Smith, as assignee of James Norfolk, brought suit against Maupin, Jameson, &c., on the following promissory note :

Six months after date we and each of us promise to pay James H. Norfolk, or order, \$1286.10, without defalcation, for value received.

WALTER C. MAUPIN,
WM. JAMESON,
SYDNEY S. BOON,

The note was assigned to Smith, the plaintiff. The defendants, amongst other things, set up as defence to the action, a total failure of consideration, and a set-off due by the payee to one of the defendants before the assignment. Demurrers were entered to the pleas containing these several defences, and the demurrers sustained. Judgment was rendered against the defendants below.

The note sued on could not be negotiated like an inland bill of exchange, within the meaning of the 6th section of the act concerning bonds and notes, for want of the words negotiable and payable. (See 6 Mo. R., Austin and Haines v. Blue.)

According, however, to the case of Waddle v. Collins, 4 Mo. R., 452, the note described in the petition is within the fourth section of the act above mentioned, it being payable without defalcation, consequently the makers are not allowed any set-off against the assignor.

But the third section of the same act declares that the de-

In suit by assignee of a note payable "without defalcation," but not negotiable like an inland bill of

fence of the maker shall not be changed by the assignment, but he may make the same defence against the note in the hands of the assignee, that he might have made against the assignor. The defence of a total failure of consideration or want of consideration, set up by the maker was allowable under this section, and the court erred in sustaining a demurrer to the plea in which such defence was contained.

There was no error in the court in refusing to quash the writ on account of the variance between it and the declaration, and in permitting an amendment. *Jones v. Cox*, 7 Mo. R. 174. Judgment reversed.

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Maupin & Jameson, imp'd.
with Boon,
v.
Smith.

exchange, for want of the words "negotiable and payable;" the payor cannot plead a set-off, though he may plead a total failure of consideration.

ATKINSON, Plaintiff, v. LANE, Defendant.

A writ of error will not lie on a judgment of non-suit; but the party must move to set aside the non-suit, and preserve the evidence and proceedings in the cause in a bill of exceptions.

Error to the St. Louis Court of Common Pleas.

LAWLESS for Plaintiff.

GEYER for Defendant.

Opinion of the Court, delivered by Tompkins, Judge.

Atkinson instituted his suit in the court of common pleas against Lane. After the jury was empannelled and sworn, the plaintiff declared that he would not further prosecute his suit, but suffer it to be dismissed at his cost.

This not-suit was taken on the 11th day of June, 1841, and on the 14th day of June the plaintiff comes into court and files his bill of exceptions to the decision of the court in excluding from the jury certain testimony offered by him. The record shows no motion and reasons for setting aside the non-suit, nor any consent of the defendant to the filing a bill of exceptions after the decision of the court. The mo-

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A writ of error will not lie on a judgment of non-suit; but the party must move to set aside the non-suit, and preserve the evidence and proceedings in the case in a bill of exceptions.

tion to set aside the non-suit, if any, ought to have appeared on the bill of exceptions, so ought the reasons.

Our statute allows the person who thinks himself injured by the decision of the court, to except to its opinion, and write his exception, but requires it to be done during the progress of the cause. Sec. 20 of the 4th article of the act concerning Practice at Law, p. 464 of the Digest; see also the case of Consaul, et al. v. Siddell, p. 253 of 7th vol. Mo. Rep.

If it were allowable to presume the assent of the other party to filing the bill of exceptions after the day on which the plaintiff abandoned his case, the failure to move to set aside the non-suit is a fatal objection to the prosecution of the writ of error. The cause will be dismissed.

McNAIR, Appellant, v. DODGE, surviving administrator of
DODGE, dec., Appellee.

1. The act of the General Assembly of the territory of Missouri of January 20, 1816. (1 Territorial Laws, p. 441,) providing that "all letters of administration, *heretofore* granted, &c., shall be recorded, &c., and that the same shall not be admitted in evidence, unless so recorded, was intended merely to furnish a rule of evidence, and the repeal of that law was a repeal of the rule. The act of January 12, 1822, (1 T. L., p. 922, sec. 13,) as well as the subsequent laws on the subject of administration, were not intended to have a retrospective operation.
2. Possession of letters of administration by the person to whom they purport to be granted, is at least *prima facie* evidence of delivery.
3. The right of an administrator to sue is not barred by the statute of limitations.
4. The 5th sec. of the act of Dec. 22, 1824, concerning "marriage contracts" (R. S. 1825, p. 526,) was not intended to embrace marriage contracts made before the change of government, i. e. 10th March, 1804.

Appeal from St. Louis Circuit Court.

GEYER for Appellant.

SPALDING & RISQUE for Appellee.

Opinion of the Court, delivered by Napton, Judge.

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1842.

McNair
v.
Dodge.

Henry Dodge, surviving administrator of Israel Dodge, deceased, brought an action of detinue against Margaret S. McNair, to recover the possession of three slaves, named in the declaration. The defendant pleaded, first, non detinet; second, limitation of five years; third, ne unques administrator; and fourth, that the plaintiff was not lawfully possessed of said slaves, or either, as alleged in declaration. The fourth plea was demurred to, and the demurrer sustained; issues were taken upon the other pleas, and were all found for plaintiff, and judgment rendered accordingly.

On the trial, the plaintiff gave in evidence letters of administration, granted the 26th September, 1806, by John Bte. Valle, judge of probate for the district of Ste. Genevieve. These letters purported to issue to *Harry Dodge* and George Bullitt, and to be under the seal of the probate court of said district, though only a scrawl, with the word seal written within it, was annexed. A deposition of said Valle accompanied the letters, stating that the letters were issued by him as judge of probate; that *Harry Dodge* is the same Henry Dodge who is now governor of Wisconsin; that George Bullitt is dead; and that the seal attached to the letters was his private seal, no seal of office having been provided.

The plaintiff then gave in evidence a marriage contract between Israel Dodge and Catharine Camp, widow of Jean Bte. Guion, acknowledged before Ch. D. Delassus, the lieutenant governor of Upper Louisiana, on the 17th January, 1804; and proved by John Ruland, the recorder of St. Louis county; that the paper was among the Spanish archives deposited in his office; that it was indexed as such by his predecessor in said office, and had been among said archives ever since he, the witness, had been recorder, until it was brought into court upon the trial. Endorsed on the back of said paper is a certificate of said recorder, that the same was filed for record on the 5th September, 1837. By the provisions of this contract, the slave Violette, the mother of the slaves

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sued for, was given to the wife during her life, and if she died without children, to revert to the husband, Israel Dodge, and his heirs.

It was further proved, that the marriage was afterwards consummated; that said Israel Dodge and his wife resided at Ste. Genevieve, in the district of Ste. Genevieve, until the death of said Dodge in 1806; that no child was born of said marriage, but that Dodge had several children by a former marriage, among whom was Henry Dodge, the plaintiff.

It was proved that Mrs. Dodge claimed the negro woman, Violette, after the death of her husband, and continued in possession of her and her children for several years, until, in the year 1830, she sold and delivered the slaves to the plaintiff in error. There appears to be no dispute about the *bona fide* character of the sale, and that it was made for a valuable consideration; it is therefore unnecessary to set out the testimony offered on that point.

The judgment of the circuit court is sought to be reversed, because of the admission of illegal testimony; and because, admitting the facts to be as found, the law arising on them is for the plaintiff in error.

The act of the general assembly of the territory of Missouri of January 20, 1816, (1 Territorial Laws, p. 441) providing that "all letters of administration, heretofore granted, &c. shall be recorded," &c. and that the same shall not be admitted in evidence, unless so recorded, was intended merely to furnish a rule of evidence, and the repeal of that law was a repeal of the rule. The act of Jan.

The act of Oct. 1, 1804, was in force in the territory, when these letters were granted. That act provided for the appointment of a judge of probate in each district, whose duty it was to take proof of last wills and testaments, and to grant letters testamentary, and letters of administration. The 4th section provided, that the judge should record last wills and testaments, and *make entries* of the granting of letters testamentary and letters of administration; but no provision is made for recording letters of administration or letters testamentary, nor is any particular form prescribed, in which such letters were to be issued. See Hempstead's Digest, p. 125. The act of January 20, 1816, provided, that "all letters of administration and letters testamentary, heretofore granted in pursuance of any law in force in the territory, shall be recorded in the clerk's office of the circuit court of such county," and the clerks are directed to certify on said letters that the same have been recorded according to law. It was further provided by this act, that no letters

of administration, made before its passage, should be admitted in evidence in any court of law or equity, unless they were recorded in the manner directed by that act. The 13th section of the act of 1822 merely provides that all letters testamentary and of administration, before they are delivered to the executor or administrator, shall be recorded, and the clerk shall certify on the letters, that they have been so recorded. It further declares that letters, unless so recorded and certified, shall not be received in evidence. This provision is substantially the same with that which was adopted in the revision of 1825, and in the subsequent revision of 1835.

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12, 1822, (1 T. L. p. 9:2, sec. 13,) as well as the subsequent laws on the subject of administration, were not intended to have a retrospective operation.

The act of 1816 is the only one containing any retrospective provision, and the section containing that provision was not re-enacted in the act of 1822, nor in any subsequent law. The act of 1816 is not now in force. That act was not intended to extinguish any *right* which had accrued under the act of 1804, but merely to furnish a rule of evidence. The repeal of that law is therefore a repeal of the rule, and there is nothing in the present administration law which appears to be designed to operate on proceedings had under former laws, with a view to affect their admissibility in evidence. The act of 1822, as well as the subsequent laws on the subject of administration, are merely directory of the forms to be observed under them, and they must be construed like other laws, not to intend a retrospective operation.

The letters of administration granted by John Bte. Valle, in 1806, must then be regulated by the act of 1804, which was in force when these letters issued. It has been seen that the law of 1804 did not require the letters to be in any particular form, nor did it require them to be under seal, or to be recorded; nor was there any thing in the unwritten law then in force in the territory, which required such letters to be under seal.

It has been objected by counsel, that there is no proof of any delivery of these letters to Dodge, the administrator; but the court are of opinion, that his possession of these letters is at least *prima facie* evidence of that fact, and no

Possession of letters of administration by the person to whom they purport to be granted, is at least *prima facie* evidence of delivery.

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Dodge.**

The right of
an administra-
tor to sue is
not barred by
the statute of
limitations.

proof being offered to rebut that presumption, it must be held conclusive.

I am not aware of any statute of limitation which bars the right of action by an administrator, or renders null his letters. In this case it is clear there could have been no final settlement of all the estate and interest of Israel Dodge until after the death of his widow, when certain reversionary interests for the first time became available to his administrator.

The admissibility of the marriage contract in evidence, is a point that was not much insisted on in the argument. This contract was what has been termed by the supreme court of the United States an authentic act; it is a solemn agreement entered into by the parties, before the lieu. governor of the province, in the presence of the relatives and friends of both parties, by all of whom, together with the public officer, it is attested. I am satisfied, without reference to our act of assembly of February 1, 1839, concerning evidence; some of the provisions of which may provide for this case, that upon general principles, such an instrument must be admissible in evidence, whenever accompanied with satisfactory proof of its genuine character. The certificate of the recorder, that it has been duly recorded in his office, is prima facie proof that the original produced, with such certificate endorsed, came from the archives of the Spanish government, because the recorder is only authorised to record such documents as are found in the archives, and to give out the original to any party interested. But in this case we have the additional testimony of the recorder, that the paper offered in evidence was found in the Spanish archives, and so marked and filed by his predecessor in office, and that the same had never left the archives until it was brought into court on the trial.

A more serious question is raised upon the effect of this document in relation to notice. The act of December 22, 1824, declares, "that all marriage contracts heretofore entered into, may be recorded in the like manner as such contracts hereafter entered into, and from the time of recording the same, shall (as to all property affected thereby, with-

in the county in which it is recorded) impart full and perfect notice to all persons, of the contents thereof; and no such marriage contract, which shall not be recorded within six months after the taking effect of this act, shall be valid or binding, or in anywise affect any property, real or personal, (except between the parties thereto, and such as have actual notice thereof,) until the same shall be deposited with the recorder of the county, wherein such property is situated, for record." If this provision was intended to embrace marriage contracts made before the change of government, it is clear that the plaintiff below was not entitled to recover, without the proof of actual notice. But I am led to the belief that this was not the design of the act, for several reasons.

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In the first place, the marriage contract before the 10th March, 1804, was a solemn public act, attended with all the forms prescribed by the laws and usages of Spain, and imparted notice to all the world. It is not very clear, that the legislature of this State would impair, or anywise alter or modify the rights which have accrued under such a contract. Whether the legislature had any power to pass a law of this character, however, is a question upon which I mean to intimate no opinion of my own, much less of the court; but it is sufficient that such a question would arise. The probability of raising a question of this kind presents a strong ground for believing that if the legislature in passing the act of 1824, had in view marriage contracts entered into under the former government, they would have embraced such contracts in express terms. But the language of the act may be entirely operative, without affecting these contracts under the Spanish government; it will embrace all contracts made since the 10th March, 1804, up to the passage of the act.

The 5th sec.
of the act of
Dec. 22, 1824,
concerning
'marriage con-
tracts,' (R. S.
1835, p. 526,) was not in-
tended to em-
brace marri-
age contracts
made before
the change of
government,
i. e. 10th Mar.
1804.

Moreover, a vast deal of property, both personal and real, as is well known, is secured by these Spanish documents, deposited in the Spanish archives. Yet the legislature, in all their acts relating to these papers, appear to have aimed merely to facilitate their introduction as evidence into our courts, but have in no instance (unless this clause in the act

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of 1824 be one) attempted to modify or restrict the rights acquired under them, or to impose new terms upon the parties interested. They appear to have been viewed as at least *quasi* records; and it is difficult to see how any transfer of them to *books* of records, kept and made up in the American style, would give them any additional validity. Hence, the acts of assembly *authorising*, not *requiring*, their record, appear to have been designed solely to make them more accessible and more easy of proof. If the act of 1824, concerning marriage contracts, was designed to embrace such as were made prior to the change of government, it is an entire anomaly in the history of our legislature, and for that reason I cannot give it such a construction, when its terms are completely carried out by a more limited construction.

Entertaining this view of the effect of the marriage contract between Israel Dodge and his wife Catharine, it is unnecessary particularly to review the instructions of the court. The instructions given embodied the correct principles of law, applicable to the facts of the case, and there was no error in refusing those asked by the defendant.

Some stress has been laid on the long possession of Catharine Dodge, which was upwards of thirty years; but upon the construction which the court is disposed to give to the marriage contract, it is clear, that her possession is not adverse; no rights accrued to the representatives of Israel Dodge until the death of his widow, which was less than five years before the institution of this suit.

Another fact may be considered a fair argument in favor of this construction. It is known that these marriage contracts are chiefly in a foreign language, and when the act of 1824 was passed, there existed perhaps twenty counties in this State, nine-tenths of the population of which were totally unacquainted with their language. The recording of these Spanish contracts would therefore have been a solemn mockery of notice, unless the legislature had also provided for their translation.

Judgment affirmed.

EVANS V. KING.

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1. Suit commenced by attachment, without personal service. The defendant appeared and moved to quash the attachment. Held, to be such an appearance to the action as authorised a general judgment, and a general execution thereon.
2. When property of the defendant attached in the hands of a third person, is retained by giving bond and security for the forth coming of the property, (according to the provisions of the 14th section of the attachment law, R. S. 1835, p. 78,) the attachment continues to be a lien on the property.

Appeal from the St. Louis Circuit Court.

GEYER for Appellant.

KING for Appellee.

Opinion of the Court, delivered by Napton, Judge.

This was an action of replevin brought by Evans against King, for a slave. The judgment of the circuit court was for the appellee, and the facts appearing on the trial were as follows:

The administrator of W. B. King commenced an action by petition in debt against one Charles D. Burriss, on a note for \$636.87, and upon his giving the necessary bond and taking the affidavit required by law, an attachment was issued on the 18th of February, 1839. On the 19th February 1839, the sheriff attached the slave, about which the present suit was brought, and finding him in the possession of one James I. McClelland, he suffered him to remain in his possession, said McClelland having given bond as the law directed for the forthcoming of the property. The writ was not served upon Burriss. Afterwards, at the March term, 1839, the defendant appeared and moved to quash the attachment for reasons filed; which motion was overruled, and at the November term, 1839, a general judgment by *nil dicat* went against Burriss, and a general execution issued, by virtue of which the sheriff levied upon the slave in controversy, the same having been delivered up to him by

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said McClelland, and upon the 18th February, 1840, sold him to the appellee.

It was proved on the part of Evans, that this slave was the property of Burriss on the 12th day of June, 1839, and that on that day Burriss sold and delivered the slave to one Dougherty; that in January, 1840, Dougherty sold and delivered said slave to Evans, (the appellant,) and that the appellant hired him to one Robbins, who took possession of the slave, and kept possession until in February, 1840, one McClelland came to his house, and without his knowledge or consent obtained possession of the slave, and delivered him to the sheriff as above stated.

The first question arising in this case is the validity of the judgment and execution. A general judgment is not authorised where there has been no appearance of the party, and the question then arises, whether a motion to quash the writ is such an appearance as will warrant a general judgment. In the case of Whiting and Williams v. Budd, (5 Mo. Rep. 444,) this subject was fully considered, and a motion to dissolve the attachment was held to be such an appearance as authorised the same steps to be taken as if the party had been duly summoned. The case of Lutes and Dulany v. Perkins, (6 M. R. 59,) has been quoted as conflicting with the views of the court in the former case. By reference to this last case, it will be found that this point was neither discussed at the bar nor considered by the court. The court merely held that as one of the defendants in that case had not been served with process, the circuit court erred in giving judgment against him, and the question of *appearance* was not raised at all. It is true, that this question is considered by the reporter as inferentially decided, because in the statement of the case by the judge, it is said that the *defendants* appeared and moved to dismiss; but I am satisfied that the record in that case would have shown, that only *one* defendant, the one who had been served with process appeared, and the word *defendants* is a clerical or typographical error; at all events, it is clear, that the question of appearance curing the want of service was not alluded to by the court, or at all considered, or intended to be decided.

The motion to quash the writ, then, clearly comes within the principle established in *Whiting and Williams v. Budd*, and it was such an appearance to the action as authorised a general judgment, and a general execution thereon.

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King.

Whether the attachment continues to be a lien on the property attached, after it has been *bonded*, in pursuance of the 14th section of the attachment law is a question which must depend upon the intent of the legislature, as evinced by all the provisions upon this subject. Upon an examination of the entire law, I am satisfied, that the provision for giving a bond and retaining the property, by persons found in its possession, was not intended to divest the lien of the creditor, but was intended chiefly to save expense to the parties, and had in view only such property as could be used without impairing its value.

Suit commenced by attachment, without personal service; the defendant appeared and moved to quash the attachment. Held, to be such an appearance to the action as authorised a general judgment, and a general execution thereon.

The terms of the bond require the forthcoming of the specific property, when and where the court shall direct, to abide the judgment of the court. The execution is directed to be levied on the property attached, whether in the hands of the officer or secured by bond. These provisions obviously do not contemplate a disposition of the property thus secured by bond. In addition to these provisions, which certainly tend to show an intention of retaining a lien on the specific property attached, notwithstanding it may be secured by bond, the legislature have provided a mode by which the inconveniences of having this property locked up during the pendency of the suit may be removed by the party who alone has any interest in the matter. The debtor, if he wishes to dispose of the property, can come in and dissolve the attachment; and it is plain, that it was not the design of the law to place a casual possessor or occupant on the same footing, and invest him with the same rights, which they have conceded to the owner. What interest has the bailee of such property, if it be merchandise, and he desires to sell it and convert it into money, in giving a forthcoming bond under this provision of the statute? What inducement could there be for one, who is not the owner, and can be no-wise benefited or injured by any disposition which the law may think proper to make of the property, to retain posses-

Where property of the defendant, attached in the hands of a third person, is retained by giving bond and security for the forthcoming of the property (according to the provisions of the 14th sec. of the attachment law, R. S. 1835, p. 78) the attachment continues to be a lien on the property.

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sion, except where the property is of a nature which can be used, and is not deteriorated or altered by such use. The provision was not designed to apply to such cases as have been suggested by the plaintiff's counsel.

The court is of opinion that the lien on the property attached continues after it has been secured by bond ; consequently an alienation by the defendant after the levy could be of no avail to defeat the title of the purchaser at the sheriff's sale. Judgment affirmed.

DIXON, impleaded with RUSSELL and CHRISTY, v. HOOD.

1. A partner of the defendant is not a competent witness on the part of the plaintiff, to prove that the defendant was a partner of the witness at the time the cause of action accrued, as he is interested in establishing the fact that others are jointly liable with him, and thereby diminishing his own responsibility.
2. The declarations, acts, or admissions of one partner, are not evidence of the partnership, against other members of the firm.

Appeal from the St. Louis Circuit Court.

POLK for Appellant.

SPALDING & TIFFANY for Appellee.

Opinion of the Court, delivered by Scott, Judge.

Hood brought an action of assumpsit on a promissory note against David W. Dixon, John Russell, and Michael Christy, comprising the firm of John Russell & Co. Dixon alone was served with process, and amongst other defences, denied by a plea verified by affidavit, the execution of the instrument sued on. During the progress of the trial a witness was asked by Hood, if John Russell, one of the firm who executed the note sued on, did, at the time of the sale of the goods which formed the consideration of the note, declare who composed the firm of John Russell & Co?

This question was objected to and the objection overruled, to which an exception was taken. Hood also introduced Michael Christy, one of the firm of John Russell & Co. who testified that the firm of Russell & Co. consisted of Dixon, the plaintiff in error, Russell, and himself. It was objected to this witness, that he was incompetent; the objection was overruled, and exceptions were preserved. Hood on the trial had a verdict and judgment, from which Dixon has appealed to this court.

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Dixon, imp'd
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and Christy,
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The chief question in the cause is, whether Christy, who was a partner, was a competent witness for Hood, the plaintiff below, to prove that the defendant, Dixon, was also a partner?

It must be admitted that the authorities on this question are so conflicting as to create some doubt as to the law on the subject. We, however, are of the impression, that the opinion maintaining that a plaintiff cannot use one partner as a witness to prove that another is co-partner with him, is sustained by a greater weight of reason than the contrary one. A witness admitted to be liable for the demand of the plaintiff, must have an interest in establishing the fact, that others are jointly liable with him, for he thereby diminishes his responsibility, as he would otherwise be liable for the whole demand, and he is interested that the plaintiff should not fail in his suit, for then an action would be brought against him for the whole amount. In the case of Blackett v. Wier, 11th Eng. Com. L. R. 257, which is mainly relied on by Hood, the defendant in error, Abbott, chief justice, says, "*it was the interest of the witness to defeat the plaintiff, for in the event of his recovery, the defendant would be entitled to contribution from the witness.*"

A partner of the defendant is not a competent witness on the part of the plaintiff to prove that the defendant was a partner of the witness at the time the cause of action accrued, as he is interested in establishing the fact that others are jointly liable with him, and thereby diminishing his own responsibility.

But is it not much more to his interest that the plaintiff should not fail, as he would thereby be subjected to an action for the whole amount claimed by the plaintiff. Brown v. Brown, 4 Taunton, 752. In answer to this view of the subject, Holroyd, justice, in the case first cited, remarked, "*that it appeared to him the defendant would have a right to recover from the witness in an action at law for money paid to his use, the whole sum recovered in this action, if he*

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could show that the witness was originally liable to pay it. But can it be law, that a party who has been compelled to pay money by a judgment, may sue a witness against him in the action in which the judgment was recovered, for the sum paid, alleging that the witness, and not himself, was liable to the first action? Can the justice of one judgment be inquired into collaterally in another action? *Marquand v. Webb*, 16 J. R., 89; *Purviance v. Dryden*, 3 Serg. and R., 402.

The declarations, acts or admissions of one partner, are not evidence of the partnership against other members of the firm.

Another error assigned is, that Russell's declaration showing who were the members of the firm, was admitted in evidence. It is clear, the declaration, acts or admissions of one partner are not evidence of the partnership against other members of the firm. But the plaintiff, in showing who composed the firm, might use the declaration of Russell to show that he was a member, it was not necessary to prove who composed the partnership by one and the same witness; the declarations of Russell were competent against himself, and consequently admissible, and the defendants below, should have called on the court to declare that it was not evidence of the partnership against other members, and having failed to do so he cannot complain.

Judgment reversed.

FINNEY & FINNEY V. ALLEN.

1. The 1st Sec. of the Act of Feb. 13, 1839, providing, that in actions founded on contract, and instituted against several defendants, the plaintiff may have judgment against such of the defendants as shall have been proven to be parties to the contract, is applicable to suits against partners, where a note has been executed by one, in the name of the firm, without the express or implied authority of the other.
2. The judgment of the Circuit Court, will not be reversed on account of an erroneous instruction, when it is apparent from the record, that such instruction could not have been prejudicial to the party complaining.

Appeal from the St. Louis Circuit Court.

POLK for Appellant.

SPALDING for Appellee.

*Opinion of the Court by Napton, Judge.*MAY TERM
1842.

This was an action by petition in debt, brought by Allen against John & William Finney. The note sued on, was as follows:

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"\$1,000. Twelve months from date, we promise to pay Michael & Frederick Collins one thousand dollars, payable in merchandise, at the store of Messrs. Finney, Lee & Co. St. Louis, April 2, 1839. J. & W. FINNEY.

On which the following endorsements appeared: Pay to G. C. Allen or order.

MICHAEL & FREDERICK COLLINS.

April 10, 1839.

"Gent: Please let the bearer L. Davis, have the amount of the within for me. G. C. ALLEN."

The defendants pleaded, first, *Nil debit*; second, payment; third, set off against plaintiff; and fourth, a set off against M. & F. Collins the assignors. Issue was taken on the first, second, and third pleas, and two replications to the fourth plea; the first a traverse, upon which issue was taken, and the second alleging, that the note was assigned to the plaintiff before the payees became indebted to the defendants, rejoinder and issue to the country.

On the trial the endorsements were proved, and that it was in the hand-writing of Frederick Collins, but made by consent of Michael. Presentment of the note to Finney, Lee & Co., was also proved, and their refusal to give merchandise. It was proved that the signature of J. & W. Finney, was in the hand-writing of William Finney, one of the firm of J. & W. Finney; that the firm consisted of John and William Finney, but that said firm had been dissolved prior to the date of the note.

The plaintiff having closed his testimony, defendant asked the Court to instruct the jury, that unless they believed from the evidence, that John and William Finney, at the time of the execution of the note sued on, composed the firm of J. & W. Finney, they must find for the defendants, which instruction was refused.

The defendant below, then offered, by way of offset, a

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note executed by Giles Griswold, Charles Collins and Mirom Leslie for, \$3,000, dated 26th Nov., 1836, and payable 1st Nov., 1838, to Michael and Frederick Collins or order, and endorsed by them on the 2nd April, 1839, to J. & W. Finney.

On cross examination of the defendants' witnesses, it appeared, that William Finney had been in the habit, at the time of making the note signed by J. & W. Finney, and before and since that time, of making notes in the name of J. & W. Finney, with the knowledge of John Finney who acquiesced in it.

In relation to the note sought to be used as a set off, it was proved, that the Finneys gave for it, the note sued on, another note of the same amount, payable two years after date, in merchandise, and credited M. & F. Collins with the amount of \$979 47, previously due to the Finneys by them; and, also credited them on the books of Finney, Lee & Co. with the sum of \$160.14 previously due by M. & F. Collins, to F., L. & Co. It was in evidence, that at the date of the assignment of this note, offered as a set off, Giles Griswold lived in New York, and M. Leslie in Illinois, and Charles Collins, then, and ever since, lived in St. Louis; that said note with others, was given for real property in Illinois, bought from said M. & F. Collins.

There was much proof conducing to show, that the note of \$3,000, was adjusted between Finney and Collins, in the purchase of a lot in St. Louis from said Collins, and that Finney was permitted to hold said note as security for the title of said lot; the testimony on this head it is not material to detail, inasmuch as the instruction based on it, is not complained of.

The Circuit Court instructed the jury that, "if they believed that no diligence had been used in collecting the \$3,000 note, given in evidence by the prosecution of a suit against the makers, or one of them, they were bound to disregard the same as evidence for defendants under the pleas of set-off: provided they found from the evidence that no sufficient excuse existed for failure to do so."

Other instructions were given, which however, were not complained of. MAY TERM.
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The first objection taken to the proceedings of the Circuit Court, is the refusal of that court to give the instruction prayed for by defendants, at the close of the plaintiffs testimony. This instruction was properly refused, because by the act of Feb. 13th, 1839, judgment may be had against any one of a number of joint promissors, if the proof only establishes the liability of one. No good reason is perceived, why this provision should not be applicable to partners, where a note has been executed by one in the name of a firm. Finney & Finney
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The instruction which the court gave in relation to the note attempted to be set up as an offset, appears to have been only objectionable, in leaving to the jury a question which the court, on the facts before it, might have decided against the plaintiff in error. The record shows that Collins was at the time this note was endorsed, and up to the trial, had been a resident of St. Louis, and that no proof of insolvency was offered. If the position of the plaintiff in error, then be correct, that the question of sufficient excuse for failing to prosecute the makers of that note, was a question of law which the court only could determine, on the facts found, this court would not be authorised to reverse the judgment of the Circuit Court for a wrong instruction, which it is apparent from the record, could not have been prejudicial to the plaintiff in error. Judgment affirmed. The 1st sect. of the act of Feb. 13, 1839, providing, that in actions founded on contract, and instituted against several defendants, the plaintiff may have judgment against such of the defendants as shall have been proven to be parties to the contract, is applicable to suits against partners, where a note has been executed by one, in the name of the firm, without the express or implied authority of the other.

Court will not be reversed on account of an erroneous instruction, when it is apparent from the record that such instruction could not have been prejudicial to the party complaining. The judgment of the Circuit

TATE & HOPKINS v. EVANS and others.

An agent appointed for a particular purpose, and acting under defined powers, cannot bind his principal by any act beyond his authority. Thus, where the authority was to draw upon the principal a bill of exchange at four months, and the bill drawn was antedated so as to become payable in less than four months, the principal was not bound.

Appeal from the St. Louis Circuit Court.

SPALDING and TIFFANY for Appellees.

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Evans.

Opinion of the Court, delivered by Scott, Judge.

Tate and Hopkins sued Evans and Dougherty as acceptors of the following bill of exchange.

NEW ORLEANS, Nov. 28, 1839.

Four months after date, this first of exchange, second unpaid, pay Tate & Hopkins, or order, one thousand five hundred dollars, value received, and charge the same to account.

Your ob't. serv't.,

J. S. ARNOLD.

To Messrs. Evans & Dougherty. St. Louis.

The plaintiffs gave in evidence the following written authority, executed by Evans and Dougherty to J. S. Arnold, to draw the said bill of exchange.

ST. LOUIS, 28th Nov., 1839.

We hereby authorise Mr. J. S. Arnold to draw on us for an amount not exceeding fifteen hundred dollars, at four months date, and we hold ourselves responsible for the acceptance and payment of the same.

EVANS & DOUGHERTY.

It was proved that the bill of exchange was actually drawn on the 23d December, 1839, and antedated 28th Nov. 1839, and that the plaintiffs took the said bill on the faith of the letter of credit above recited.

On this evidence the court below, sitting as a jury, found a verdict for the defendants; a motion for a new trial was made and overruled, and the cause is brought here by appeal.

The only question arising on the record is, whether there is any evidence of the acceptance by Evans & Dougherty of the bill of exchange offered in proof, it having been ante dated, and hence not in fact payable at four month's date, and so not in conformity to the authority conferred in Arnold, the drawer.

The difference between a general and special agent is well understood. The principal is bound by the acts of a general agent, provided they are within the scope of his authority. But an agent appointed for a particular purpose, and acting under defined powers, cannot bind his principal by any act beyond his authority. Story on Agency, 63, 73. Thus in *Batty v. Carswell*, 2 John. 48, the authority was limited to a single act, to be performed in a particular manner. The authority was to execute a note for two hundred and fifty dollars, payable in six months. The agent gave a note payable in sixty days. The court held the principal was not bound. This case seems in point.

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Judgment affirmed.

SWERINGEN V. ADMINISTRATOR of EBERIUS,

And SWERINGEN and BREDELL, v. SAME.

1. The lien of an attachment is lost by the death of the debtor before judgment.
2. An execution cannot issue against a decedent's estate, on a judgment obtained against him in his life time; but all such judgments must be classed against the estate, according to the provisions of the administration law.

Error to Franklin Circuit Court.

POLK for Plaintiffs.

GAMBLE for Defendant.

Opinion of the Court, delivered by Tompkins. Judge.

These were actions of assumpsit brought by the plaintiffs in error, in the circuit court, by attachment. The writ was levied on property, and returned not found as to the defendant. After the commencement of the suit, and before the rendition of the judgment, the defendant below died, and af-

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Administ'r of
Eberius;
and
Sweringen
and Bredell
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ter his death, David Edwards, public administrator of Franklin county, and also administrator of said Eberius, appeared to the action, and pleaded the general issue; upon which issue a trial was had, and judgment rendered for the plaintiffs in error, and execution awarded. A special fieri facias was awarded against the attached property, and at the return term, the administrator moved the court to quash the said fieri facias, and the court, on such motion, quashed the fi. fa.

This act of the court is assigned for error. The defendant in error contends, that the law does not authorise the issuing of an execution against the assets of an intestate; that the right of issuing an execution does not result from the fact that the property was attached.

The lien of an attachment is lost by the death of the debtor before judgment.

The lien by attachment is given against certain persons, who by their conduct subject themselves to the suspicion of fraudulent conduct, the plaintiff in the attachment making oath to such facts as induce this suspicion; and when the defendant dies, one would suppose that, as he is no longer able to defeat the just claims of his creditors, this lien of the attachment ought also to die. A judgment obtained in a court of record against a debtor who appears and defends the action, is a lien on the real property of the defendant, and a much more meritorious lien than a lien of attachment, procured simply by the affidavit of the plaintiff; and yet this lien of a judgment yields its preference, after the death of the defendant. The administrator then steps in and takes possession of the goods. They are under the guardianship of the law from the moment the defendant dies. The first section of the fourth article of the act respecting executors and administrators, directs how all demands against the estate of any deceased person shall be classed: First, funeral expenses; second, expenses of the last sickness, wages of servants, and demands for medicine and medical attendance, during the last sickness of the deceased; third, debts due to the State; fourth, judgments rendered against the deceased.

An execution cannot issue against a decedent's estate, on a judg-

Thus we see that there are three classes of debts preferred to judgments rendered against the deceased; judgments, too, rendered in the courts of justice on an investigation of the

merits of the several cases, the defendant being served with notice. If, then, the lien of judgment thus obtained, is made by the statute to yield to the superior merits of the three first classes, it is difficult to conceive that the statute intended by implication to prefer to those classes of debts, the lien obtained by attaching the property of the deceased in his lifetime, when that attachment issues on the affidavit only of merits made by the plaintiff on a supposed disposition in the defendant, to deal fraudulently with his creditors. But the administrator contends further, that the third section of the same article disposes of this very case. It directs that all actions pending against any person at the time of his death, shall be considered demands legally exhibited against the estate, from the time they shall be revived and classed accordingly, and lest we should be left in doubt, whether demands against the estate of a deceased person are to be paid according to their classification, the administrator is in express terms commanded to pay all demands, as far as he has assets, in the order in which they are classed, and further directs that no demand of one class shall be paid until all previous classes are satisfied. Sec. 21 of same article.

It appears, then, to me, that the lien created by the issuing of the attachment, is lost when the defendant in the attachment dies; and that the judgment obtained against the administrator must take its class under the act concerning administrators, &c.

The judgment of the circuit court quashing the fieri facias is therefore affirmed.

Opinion of Scott, Judge.

An execution cannot issue on a judgment obtained against a testator or intestate. The judgment in this case was a general one, and the circuit court did right in quashing the writ of execution. No opinion is given as to the lien of the attachment, or of the judgment.

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Sweringen
and Bredell
v.
same.

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BURROWS & JENNINGS v. ALTER and others.

Burrows and
Jennings
v.
Alter and
others.

1. Under the plea that a deed was obtained by fraud, covin, and misrepresentation, the only evidence of fraud that can be received is that in relation to the execution of the instrument. Fraud in the consideration, or a partial or total failure of consideration, is no defence to an action at law, upon a bond.
- 2 The validity of a deed of assignment cannot be questioned by those creditors who voluntarily, and with full knowledge of all the circumstances, became parties to it, although it may be void as to those creditors who are not parties to the deed.

Error to St. Louis Circuit Court.

HAMILTON for Plaintiffs in Error.

BLAIR and GANTT for Defendants.

Opinion of the Court, delivered by Scott, Judge.

The plaintiffs, as endorsers, brought an action of assumpsit on a bill of exchange against the defendants, as drawers of the same. The defendants pleaded a release. The plaintiffs replied that the release was obtained by fraud, covin, and misrepresentation, on which issue was joined. On the trial the plaintiffs obtained a verdict and judgment, to reverse which this writ of error is prosecuted.

Under the plea that a deed was obtained by fraud, covin, and misrepresentation, the only evidence of fraud that can be received is that in relation to the execution of the instrument. Fraud in the consideration, or a partial or total failure of consideration, is no defence to an action at law, upon a bond.

It appears from the evidence that the defendants, being in failing circumstances, made an assignment of their effects for the benefit of their creditors. The deed of assignment contained a clause by which all creditors claiming the benefits of its provisions, were required to release their debts against the defendants. The plaintiffs became a party to the assignment by executing the same. It is admitted that under the decisions of this court the deed of assignment was void as to creditors. Under the plea that a deed was obtained by fraud, covin, and misrepresentation, the only evidence of fraud that can be received is that in relation to the execution of the instrument, as that the party was illiterate, and the deed was misread to him, or that another deed than that intended to be executed was substituted. But fraud in

the consideration, or a partial or total failure of consideration, is no defence to an action at law on a bond. The seal itself imports a consideration. Relief must be sought in equity. *Don v. Munsell*, 13 John; *Jackson v. Hill*, 8 Cowen; 6 Munford. 358; *Montgomery v. Tiffin*, 1 Mo. Rep. It has been repeatedly remarked that the precedent of a plea in Chitty, asserting a doctrine contrary to this principle, is without authority, and is not sustained by the cases cited in support of it.

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Jennings
v.
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We cannot imagine on what ground it can be said the release pleaded in bar, was fraudulently obtained by the defendants. The deed of assignment was not absolutely void; it was only voidable by the creditors and purchasers of the party making it. *Crocket v. Wright*, 7 Missouri Rep.; 15 John. R. 571; 5 Cowen, 547. Here the plaintiffs so far from avoiding the deed, voluntarily assented to it, with their eyes open, and fully apprised of all the facts, they executed it. How can it be said that the deed was made to hinder, delay, or defraud them, when they voluntarily became parties to the same. That the deed is void as to those who did not assent to it, is no reason why its validity should be questioned by those who executed it. *Hone v. Henriquez*, 13 Wendell, 240. The court does not wish to be understood as giving any opinion as to the right of the plaintiffs to relief in equity. It simply maintains that at law the party is precluded from denying the validity of the release contained in the deed of assignment to which he deliberately became a party.

The validity of a deed of assignment cannot be questioned by those creditors who voluntarily, and with full knowledge of all the circumstances, become parties to it, although it may be void as to those creditors who are not parties to the deed.

Judgment reversed.

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DAY V. KERR.

Day v. Kerr. In a suit in chancery, where infant defendants had not been served with process, but, upon inspection of the record, it appeared that, on their motion, a guardian, *ad litem*, had been appointed, who proceeded in the cause: The court held that the decree against the infants was not void, and therefore could not be impeached in a collateral suit.

Error to St. Louis Circuit Court.

ALLEN for Plaintiff.

SPALDING & TIFFANY for Defendants.

Opinion of the Court delivered by Tompkins, Judge.

This is an action of ejectment, brought by Matthew Kerr, against Charles Day, in the circuit court of St. Louis county. Judgment was rendered for Kerr, and to reverse the judgment this writ of error is prosecuted.

The record shows that in the year 1807, Adam Woolfort was in possession of the lot for which this action was brought, and that he died possessed in the year 1816, leaving a widow, Nancy Woolfort, and three children, Henry, Ann, and Minerva, who were minors; that in 1818 a suit was commenced in chancery against the widow, and the minor children, heirs of said Woolfort, and that the writ was returned to the August term of that year. The sheriff's return was in the words following: "Executed this summons by leaving a copy of the bill, and reading this summons to Nancy Woolfort. Henry and Ann Woolfort are minors. 28th day of February, 1818." At the same term of the same year, and on the 24th day of August, 1818, an order was made in the said cause in the words following, to wit: "Matthew Kerr v. Nancy Woolfort, Ann Woolfort, and Minerva Woolfort, heirs and representatives of said Adam Woolfort. The complainant by his attorney appears before the court here, and on the motion, and by and with the consent of said Henry, Ann, and Minerva, the minor heirs and representatives of the said Adam Woolfort, the

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court appoints John M. Reed the guardian of the said minors, for the purpose of answering the bill of complaint, and afterwards the said infant heirs, by their guardian, filed their answer in the said cause ;" and the chancellor under the state government decreed the title in the property to Kerr the plaintiff in this cause. The defendant moved the court to instruct the jury, that no title passed out of the minor heirs of Adam Woolfort by this decree of the court of chancery in favor of Matthew Kerr. It is insisted by the plaintiff in error that, as no process was served in the chancery suit, which is the evidence of the title of the plaintiff in this cause, on the infants, and certainly none on Minerva, whose name is not even mentioned in the sheriff's return, the decree in Kerr's favor is a mere nullity ; that the minors could not even move the court to appoint a guardian. However idle it may be for an officer to read a summons in chancery to an infant, it is conceded that it was his duty to serve the process as the law prescribed, otherwise there could be no ground on which the court could issue further process to bring them in. None other appears to have been issued. But certain it is they were present in court, and when they were in the power of the court, it was in the power of the court, if they were above the age of fourteen years, to admit them to choose a guardian. Geyer's Digest, p. 305. It appears from the record, that they did choose one ; and if, in reality, they did move the court for leave, I should suppose that such motion would not vitiate the assent they afterwards gave to the appointment of the guardian. I suppose, however, that in reality they never moved the court in the cause, and that the entering of that motion was the mere act of the clerk, and that nobody ever observed it during the progress of the cause. Standing, however, as it does, we are forced to regard it as an appearance, and as such it is certainly a nullity : but it cannot follow, that because the motion gave the court no power over them, therefore the appointment of the guardian, and their assent to such appointment, are void. If the infants, who we are to presume were then above fourteen years of age, had

was not void, and therefore could not be impeached in a collateral suit.

In a suit in chancery, where infant defendants had not been served with process, but, upon inspection of the record, it appeared that, on their motion, a guardian, *ad litem*, had been appointed, who proceeded in the cause : The court held that the decree against the infants

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Day v. Kerr. in due time moved in this cause, it might have been perhaps some evidence of fraud in obtaining the decree, that they were brought into court without the previous service of the subpoena in chancery.

But unsupported by other evidence, it would have been, in my opinion, of little avail even to them. They, however, having assented to the appointment of guardian, and that guardian having elected to proceed in the cause, the decree of the court therein cannot be regarded as void, and therefore Day, the plaintiff in error, has no right to object to its being given in evidence against him in this cause. The circuit court then, in my opinion, committed no error in refusing to give the instructions required; and its judgment is therefore affirmed.

CHOUTEAU and KEIZER v. HOPE.

In trover, the plaintiff must show some *property* in himself, either general or special. Where the evidence establishes that the subject matter of the suit was *not property*, either of the plaintiffs or any one else, it is a complete answer to the action.

Error to St. Louis Circuit Court.

GAMBLE for Plaintiff.

ALLEN for Defendant.

Opinion of the Court, delivered by Napton, Judge.

This was an action of trover, brought by Hope, to recover the value of a slave, alleged to have been converted by the defendants to their use.

On the trial, evidence was given to show that the boy named in the declaration was free: whereupon, the defendants below asked the court to instruct the jury, that if they believed from the evidence, that the boy in the declaration

mentioned was born in the state of Illinois, and raised there, and is now of the age of eighteen or nineteen years, the said boy is free, and the plaintiff is not entitled to recover for him as property.

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This instruction the court refused; but told the jury, that if they should find the boy in question had always been held as a slave, and used as such, it is sufficient evidence of his being a slave, for the purposes of this suit, and his right to freedom does not come in question in this action.

It was proved that plaintiffs in error had employed the boy on their boat, as a free boy, and had discharged him as such.

It is admitted by the counsel on both sides, that the boy sued for, was, by the constitution of Illinois, as interpreted by this court in former decisions, entitled to his freedom. These admissions renders unnecessary any examination of the sufficiency of the proof; and the only question is, whether such proof established a good defence to the action.

The principle is well settled that the plaintiff in trover must show some *property*, in himself, either general or special. The defence offered, establishes that the subject matter of the suit was not property, either of the plaintiff or any one else. Such defence is a complete answer to the action.

In trover, the plaintiff must show some *property* in himself, either general or special. Where the evidence establishes that the subject matter of the suit was *not property*, either of the plaintiff or any one else, it is a complete answer to the action.

Nor is there any thing contrary to the spirit and policy of our laws in allowing this defence; for the record of the judgment in this suit would not be available in an action brought by the negro for his freedom.

If Keizer and Chouteau had hired this negro of the plaintiffs, the question would come up in a very different shape, in an action founded on the bailment; but in this case, there appears to be little room for doubt, that the freedom of the negro could be proved, like any other *fact*, which would show property out of the plaintiff, or no property at all.

Judgment reversed, and cause remanded to the circuit court.

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CHRISTY v. PRICE, Adm'r. of FUGATE.

- Christy
v.
Price, Adm'r.
1. A party cannot recover on an *implied* contract, when there is an express contract in force.
 2. The refusal of a correct instruction, unaccompanied with any exposition of the law of the case to the jury, is error.

Error to St. Louis Circuit Court.

SPALDING and TIFFANY for Plaintiff.

BLAIR and GANTT for Defendant.

Opinion of the Court, delivered by Napton, Judge.

The plaintiff in error and one James Dean, executed to Price, the defendant in error, the following instrument :

"We, or either of us, promise to pay to Isaac J. Price, administrator of William C. Fugate, the sum of one hundred and thirty-two dollars, it being for the hire of a negro man named *South*, for the term of one year from this date, and we bind ourselves not to remove the said negro out of this county, and to furnish him with good clothing, suitable to the season, and give him good medical aid, if sick, and pay doctors' bills, if any, created, and return said negro to Isaac J. Price, on the first day of March next, at the court house door of St. Louis county, with suitable clothing for the season, as witness our hands and seals, this 1st March, 1837.

J. DEAN,
HOWARD F. CHRISTY."

At the November term, 1839, of the St. Louis circuit court, Price filed his declaration against Christy, averring that, whereas, in consideration that the said plaintiff had, on the first day of March, 1837, at the county of St. Louis, at the special instance and request of him, the said defendant, then and there let to him, and delivered to said defendant, and a certain James Dean, a certain negro man, &c., to be worked and used by the said defendant and the said Dean, for the space of one year. The said defendant undertook

and faithfully promised, among other things, that he would take due and proper care of said negro, and would return him at the expiration of a year. to wit, &c.; *Nevertheless*, the said defendant took so little and such bad care of the said negro, &c., that by and through the mere carelessness, recklessness, remissness, negligence, &c. of him the said defendant and of the said Dean, the said negro being, by the said James Dean, with the assent and permission of said defendant, employed and compelled to work in a dangerous and improper situation, to wit, in a certain sandpit; and afterwards, to wit, &c., by the caving and falling of the sides of the said sandpit, wherein the said negro man was compelled to work as aforesaid, was crushed, overwhelmed, suffocated, and killed, contrary to the form and effect of the promise and undertaking of the said defendant, to the damage of said plaintiff, &c.

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The defendant pleaded first, not guilty; second, ne unques administrator; third, said negro was not lost by neglect or want of care of defendant; and fourthly, that said boy was not employed by said Dean with the assent and permission of said defendant, and compelled, with such permission and assent, to work in a dangerous and improper situation, in manner and form as alleged, &c.

Issues were taken upon all these pleas, and each of the issues were found for the plaintiff, and his damages assessed at six hundred dollars. A motion was made for a new trial, on the grounds, that the verdict was against law and evidence, and because the court refused to give proper instructions.

There were six instructions asked for on the trial, by the plaintiff in error, but they were all refused. All the instructions except, perhaps, one, appear to have been based on the supposition that the action was trespass on the case; and the court refused the instruction, as it would seem, because, in its opinion, the action was assumpsit on the contract. If the action be case, it is agreed that the instructions were properly refused.

The fourth instruction which was asked, and refused was, "That in this action the burthen is on the plaintiff, to prove

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the neglect and carelessness charged in the declaration, and it is not to be presumed without evidence."

It will be observed that all the pleas filed in this case were upon the supposition that the declaration was in *case*, and not *assumpsit*. Issues were taken to these pleas, and the jury responded to each of the issues, finding the defendant *guilty*, in the manner and form as charged, and that plaintiff was administrator as alleged, and that the negro was lost by the carelessness of defendant.

The declaration is, in my judgment, clearly a declaration in *assumpsit*. It alleges that in consideration of the bailment of a certain slave to the defendant and another, defendant undertook and promised to take good care of said slave; but that he took so little care of said slave, and made him work in such dangerous situations, that the slave was killed, to the damage of the plaintiff. In substance, the whole averment is, that for a valuable consideration, to wit, the bailment of a slave, the defendant made a contract with plaintiff to take good care of said slave, and then avers a breach of that contract, by which the plaintiff was damaged.

It appears to me unnecessary to enter into any critical examination of the forms which precedents have adopted, with a view to test the accuracy of this form by those which use and judicial determinations have sanctioned. The distinction between the forms in *assumpsit* and *case* are so subtle and refined, that the basis of the distinction is hardly worth an inquiry. In the declaration now before the court, every material allegation avers words of *contract*, and not of *tort*; "*Undertook and promised*," and "contrary to his undertaking and promise," are not expressions to be found in an action of *case*, (in *tort*), except where the promise and undertaking are made merely inducement to the action. Here the contract is not brought in by way of inducement, but by express averment, and its breach is expressly averred as the ground for claiming damages.

If I am correct in supposing the action to be in form *assumpsit*, it is clear that the plaintiff in error cannot avail himself here of any misjoinder, occasioned by his own pleadings.

But there is one objection to the judgment which was obtained in the circuit court, which may entitle the plaintiff in error to its reversal.

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The plaintiff sues in assumpsit, charges a special contract by defendant to take good care of the slave hired ; and alleges a breach of that special contract. To prove his case, he offers in evidence a special written contract, which contains not one word about any care that was to be taken of the slave by the defendant or his co-contractor, Dean ; but is an obligation on their part to perform several other things, to wit ; to clothe and feed the negro ; to pay his doctor's bills, if sick ; to return him at the end of the year, &c. It is true that by implication of law, the obligees in the contract are bound to take good care of the negro, and would be responsible, if through their negligence or misfeasance the slave was lost : But I have not seen any case, in which a plaintiff is allowed to sue and recover on an implied contract, where there was an express contract in force, and not executed or rescinded. It is plain, that the party here could have sued on his express contract to return the negro, and either in his declaration or replication charged the misfeasance complained of ; and if his case was made out by proof, he could have recovered.

A party cannot recover on an implied contract, when there is an express contract in force.

I am aware that there are decisions which go so far as to settle that when the express contract is nothing more than the law would imply, a party may recover on the common counts. But the declaration in this case was not general indebitatus assumpsit, but on a special contract, and that an *implied* contract, when there was an express contract in force.

On this point, however, no adjudication is necessary ; an amendment of the declaration in this particular might be advisable, to effect an ultimate decision of the case on its merits.

The fourth instruction which was asked by the plaintiff in error, and refused by the circuit court, it need hardly be said, was clearly the law. It amounted to nothing more nor less than that the plaintiff was bound to make out his case ; that he was bound to prove the misfeasance charged in his

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v.
Price, Adm'r.

The refusal of
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with any ex-
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case to the
jury is error.

declaration. This instruction being connected with five or six others which were wrong, the circuit court probably overlooked it; or the court may have refused it on the supposition that like the others asked, it was intended to mislead the jury, and to create an impression that the negligence to be proved, must be brought home to Howard F. Christy personally. But the instruction is couched in general language, and merely tells the jury that the plaintiff must prove the negligence as charged. If the court had given any instruction at all in this case, and told the jury what was the law applicable to the case, I apprehend this court would not be disposed to grant a new trial for the refusal of the fourth instruction. But we cannot tell, but that the refusal of the court to give this instruction, unaccompanied as it was with any exposition of the law of the case to the jury, may have induced a belief on the part of the jury, that the plaintiff had made out his case, when he produced the written agreement, and proved the death of the negro. I should not, however, place much reliance on this conjecture, in a case free from doubts in other respects, especially as the jury responded to all the issues, and expressly found that the negro was lost by the carelessness of the defendant.

As one of my brother judges is of opinion that this action was in tort, and not on contract, and as I am not myself satisfied that the jury were advised of what proof was requisite to establish Chisty's liability, I am willing that the judgment be reversed and the cause remanded to the circuit court for a new trial.

VAN WINKLE and RANDALL v. M'KEE, Defendant, and
BAUM, Garnishee.

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Randall
v.
McKee, def't.
and Baum
Garnishee.

A deed of assignment void as to creditors is valid between the parties, and does not, from being void as to creditors, create the relation of debtor and creditor between the grantor in the assignment and the assignee. The validity of the assignment cannot be tried in a court of law, upon an issue made between a judgment creditor and the assignee, garnisheed on an execution, under the provisions of the 8th section of the act concerning "executions." (R. S. 1835, p. 254.)

Error to St. Louis Circuit Court.

HAMILTON for Plaintiff.

GAMBLE for Garnishee.

Opinion of the Court, delivered by Scott, Judge.

Van Winkle and Randall obtained a judgment in the St. Louis circuit court against Hiram McKee, on which a fieri facias was issued, with directions to summon Jacob Baum as garnishee. Baum appeared, and in answer to the interrogatories exhibited, stated that McKee had made an assignment to him of property and debts for the benefit of his creditors, requiring them, before they should have any interest in the trust, to assent to the assignment, and release McKee from his debts. It was admitted, this assignment was invalid as to the creditors of McKee, for the reason it exacted from them a release of their debts. Baum's answer alleged furthermore, that he, immediately after the assignment, took the property in possession, and proceeded to sell the same, and collect the debts, and then gives a detailed account of the manner in which he executed his trust: claims a credit for payments which he made; acknowledges a balance in his hands, which he claims, and denies that he owes the defendant, McKee, any thing. The answer was put in issue, which was tried by the court sitting as a jury, and a verdict and judgment were rendered for the garnishee, to reverse which this writ of error was sued out.

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A deed of assignment void as to creditors is valid between the parties, and does not, from being void as to creditors, create the relation of debtor and creditor between the grantor in the assignment, and the assignee. The validity of the assignment cannot be tried in a court of law, upon an issue made between a judgment creditor and the assignee, garnisheed on an execution, under the provisions of the 8th sect. of the act concerning "executions." (R. S. 1835, p. 254.)

The point has been made, whether a trustee is a debtor, within the contemplation of the eighth section of the act concerning executors, and consequently liable to be summoned as garnishees under its provisions. That section enacts, when a fieri facias shall be issued, if no property can be found whereof to levy the amount due on the writ, the sheriff shall summon such debtors of the defendant as the plaintiff shall direct, to appear and answer such interrogatories as may be exhibited touching their indebtedness to the defendant in the execution ; and further provides, that like proceedings shall be had as are or may be provided in case of garnishees summoned in suits originating by attachments. It is not conceived that any necessity exists for giving this section a broader interpretation than is warranted by its letter and spirit, as there is a forum whose powers are ample, and whose mode of procedure is well suited for affording redress to creditors, whose executions may be hindered by the contrivances of their debtors. This is an attempt to give to courts of law the control and management of trusts. The act of summoning the assignee is an admission that he is a trustee for the debtor in the execution ; or at least it assumes, that although the assignment is void as to creditors, yet as between the parties to it, it has had the effect of transferring the property and effects of the debtor. The creditors may treat it as a nullity, and sue out their executions, the liens of which will attach on all property subject to execution, from the time they are placed in the hands of the sheriff, and it may be seized and sold under them ; and if there are debts conveyed by the assignment, the persons owing those debts may be summoned as garnishees. Assuming, then, that the assignee is a trustee for the creditors, can it be said that he is a debtor to the defendant in the execution. The assignment, although void as to creditors, is yet valid between the parties ; and the grantor in the assignment having disposed of his property for a fraudulent purpose, would not be heard in a court of law or equity asserting his rights against his assignee. Story's Equity, first edition, sec. 371.

For the sake of creditors and purchasers, courts of equity

would compel an execution of the trust, even although the grantor in the assignment might be a party to the suit with his creditors; yet, as between the parties themselves, its principles forbid its interference. This assignment being void as to creditors on account of fraud, could not, according to those principles, create the relation of creditor and debtor between the grantor in the assignment and the assignee. He could safely say he was no debtor to the grantor in the assignment. Here then is a mere trust in the hands of the assignee, subject to the claims of creditors. Are the powers of a court of law adequate to its adjustment? Can it take an account of, and adjust the conflicting claims of different creditors, direct the order of preferences and payments, according to their respective priorities, and marshal the various funds on which particular creditors may have a lien, so as to secure to each creditor a due proportion of the assets according to his particular right? It cannot be necessary for courts of law to repudiate any such jurisdiction: it never belonged to them, and they are sufficiently burdened with their own legitimate duties, if nothing else influenced them, not to desire an inconvenient enlargement, by usurping the peculiar functions of our courts of equity. Judge Story, in his Commentaries on Equity, remarks: "The trusts arising under general assignments for the benefit of creditors are in a peculiar sense the objects of equity jurisdiction. For, although at law there may, under some circumstances, be a remedy for the creditors to enforce the trusts, that remedy must be very inadequate, as a measure of full relief. On the other hand, courts of equity, by their power of enforcing a discovery and account from the trustees, and of making all the creditors, as well as the debtor, parties to the suit, can administer entire justice; and distribute the whole funds in their proper order among all the claimants, upon the application of any of them, either in his own behalf, or on behalf of himself and all the other creditors." Are not most of the mischiefs which flow from these assignments, to be traced to the departure from these principles in their administration? If the assignee can be called on to exhibit his accounts to one, he can to every creditor of the person making the as-

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signment, and the costs of these proceedings must consume the trust fund.

But to show the great inconvenience of the construction contended for by the appellant, let it be borne in mind that justices of the peace, in relation to executions which may issue from their courts, have precisely the same power and jurisdiction as is conferred on the circuit court. See Revised Code, "Justices' Courts," article 7, sec. 12. Can these courts be adequate to the adjustment of the question which must necessarily arise in administering the trust; must they not necessarily transcend their jurisdiction, in settling the claims of persons under it?

Judgment affirmed.

RIGGS v. THE CITY OF ST. LOUIS.

To entitle a party to damages upon a protested bill of exchange, drawn or negotiated within this State, the bill must express to be for "*value received*."

Error to St. Louis Court of Common Pleas.

CROCKETT for Plaintiff.

HUDSON for Defendant.

Opinion of the Court, delivered by Tompkins, Judge.

The plaintiff in error, Elisha Riggs, commenced his suit in the court of common pleas, against the City of St. Louis, upon several instruments of writing, made by the city in the form following, to wit:

Treasurer of the City of St. Louis, pay to bearer fifty dollars, being half a year's interest due on, &c., on the bond of the City of St. Louis, number —, to R. Simpson or order, on account of funded debt. Signed, &c.

The counsel for the plaintiff in error has cited a number of authorities to show that this instrument of writing is a bill of exchange under the law-merchant; and not content with the judgment of the court of common pleas in his favor, for the principal and interest due on the several instruments of writing, on which the action was founded, he now seeks to reverse that judgment, because the court did not also allow him damages, as on a bill of exchange. On the part of the city, it is contended that these instruments of writing here sued on, are not bills of exchange, being payable out of a particular fund, and not expressed according to our statute, to be for value received. I see no evidence on the face of these instruments that they were to be paid out of a particular fund; and though it was agreed on the record that the city ordinances might be read as public law in the agreement of the cause, we have had no references to them to show that the writings sued on were to be thus paid. Our statute, however, we believe, settles the matter. The act concerning bills of exchange, section 7, p. 98 of the Digest of 1835, provides, that "When any bill of exchange expressed to be for value received, drawn or negotiated within this State, shall be duly presented for acceptance or payment, and protested for non-acceptance or non-payment, there shall be allowed and paid to the holder by the drawer and endorser, having due notice of the dishonor of the bill, damages, &c.

The counsel for the plaintiff in error, contends that it is sufficient to satisfy the above recited section of the law, if it can be collected from the face of the instruments of writing, that they were made for value received, and it was not in the contemplation of the lawgiver that the very words "value received," should appear on the face of the writing; but that it is sufficient if equivalent terms are used. What would be equivalent terms, must consequently be matter of construction, and on many occasions different opinions might be entertained, and thus a door for litigation left open. Our statute concerning bonds and promissory notes, has defined what shall be a negotiable promissory note. See section six of the act, page 105 of the Digest. And this section has

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To entitle a
party to damages upon a
protested bill
of exchange,

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received a strict judicial construction. We now feel disposed to construe this section of the law concerning bills of exchange with the same strictness, in furtherance of what is believed to be the intention of the legislative body. It is as convenient to write the words 'value received,' as any others of the like import; and if suitors demand damages by the benefit of the act, they must comply with the terms prescribed by that act. Because, then, the instruments of writing sued on are not expressed to be for "value received," it is believed the court of common pleas committed no error in refusing the plaintiff in error damages. Its judgment, then, is affirmed.

POWELL & POWELL V. THOMAS.

Where a person endorses a promissory note in blank, not being a payee, or endorsee, he is equally liable with the maker of the note, and may be sued as an original promisor, whether the note is negotiable like an inland bill of exchange or not.

Appeal from St. Louis Court of Common Pleas.

CARROLL for Appellants.

HUDSON for Appellee.

Opinion of the Court, delivered by Scott, Judge.

David Thomas instituted an action of assumpsit against P. & J. Powell, on a promissory note, of which the following is a copy :

St. Louis, March 1st, 1839.

Six months after date I promise to pay to the order of David Thomas, eight hundred and seven $\frac{61}{100}$ dollars, for value received, with interest at the rate of ten per cent. per annum, from due until paid.

THOMAS L. FONTAINE.

On the back of the note the names of P. & J. Powell were endorsed in blank, and they were charged in the declaration as the makers of the note. On the trial, the court below instructed the jury that Thomas L. Fontaine was the party originally liable on the note, and that P. & J. Powell were his securities. There was a verdict and judgment for Thomas, the plaintiff below, from which P. & J. Powell have appealed to this court. The question is, whether P. & J. Powell are to be regarded as securities to the note. This is a case of the first impression in this court, and it must be admitted is not without its difficulties. Cases from the English and American books have been cited, which show that an endorsement like that in the present case, has been regarded by some courts as evidence of an undertaking of one character, and by other courts as evidence of another and a different undertaking. All admit that the party making the endorsement is bound in some way, or in some event; but a contrariety of opinion prevails as to the time and manner of the liability attaching. Should the endorser's liability be varied from that intended by him at the time of making the endorsement, he must attribute the consequences to his own neglect, as it was in his power to define his undertaking with precision. What then is the nature of the undertaking of a party who endorses a note in blank, payable to another? The position of the name on the instrument would seem to signify that he was only to be held as endorser; but if that was the intention, he should have been the payee of the note, as otherwise he could not, by the endorsement, transfer the legal interest in the note. In the case of *Moris v. Bird*, 11 Massachusetts Reports, 440, similar to the present one, the court says, it was plain the defendant intended making himself liable in some way. Had the note been made payable to him, negotiable in its form, the plaintiff would have been restricted to such an engagement, written over the signature, as would conform to the nature of the instrument. In such case the defendant would have been held as endorser, and in no other form, for such must be presumed to have been the intent of the parties to the instrument. But this note was not made payable to the defendant, and therefore was

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not negotiable by his endorsement. What then was the effect of his signature? It was to make him absolutely liable to pay the contents of the note. He puts his name upon a note payable to another, knowing he could not be considered in the light of a common endorser, and that he was entitled to none of the privileges of that character. He leaves it to the holder of the note to write any thing over his name which might be construed not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety binding himself originally with the principal, and he has a right to do so. If he was a surety, then he may be sued as original promissor."

We have taken the liberty to transcribe this passage from the opinion delivered in the above cause, as embodying our own views, and as containing the most reasonable interpretation of the intent of the party making an endorsement similar to that in the cause now under consideration. Many other cases might be cited from the same reports, supporting this view of the subject. See 13 John. 175.

The case of Baker and Briggs, 8 Pickering, is an authority to show that where the contrary does not appear, it will be presumed that the execution of the note, and the making the endorsement, were cotemporaneous acts. The party making the endorsement is regarded as being privy to the consideration; and it will be presumed that it was taken on the faith of the endorsement, and he will not be heard in objecting the want of consideration for his endorsement. This we hold is the light in which a blank endorsement, made by a party who is not the payee of a note, is to be regarded, if nothing to the contrary appears. The real contract of the parties may be shown; but in the absence of all proof, the foregoing are the principles by which we think courts should be governed in determining the liability of a party who, when not a payee or endorsee, will make a blank endorsement on a promissory note. Carver v. Weaver, 5 Massachusetts Rep. 546.

There being another cause before the court involving the same question on a note negotiable, we are of opinion that

the doctrine stated above is applicable as well to notes which may be negotiable like inland bills of exchange, as to notes which are not negotiable.

Judgment affirmed.

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v.
Knighton.

BYRD V. KNIGHTON—THE SAME V. THE SAME.

Defendant covenanted with plaintiff for the payment of a certain sum of money, and at the same time, and as part of the same transaction, gave his notes to plaintiff for the payment of the money. Held: That the plaintiff had two remedies, one on the covenant and the other on the notes, and was at liberty to pursue either.

Appeal from Jefferson Circuit Court.

ALLEN for Appellant.

TRIPPELL for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

Thomas Byrd commenced this action in the circuit court of Jefferson county, on a promissory note for five hundred dollars. Judgment was given in the circuit court for the defendant, and to reverse that judgment this appeal is prosecuted.

On the trial of the cause, the defendant offered in evidence, and the court admitted, a deed to the following effect: "This agreement, made this 13th day of December, 1838, betwixt Thomas Byrd, of the one part, and Ammon Knighton, of the other, witnesseth: that the said Byrd, for and in consideration of two notes of hand, signed by the said Knighton, one due and payable on the 25th day of September, 1839, the other due and payable in the year following. Reference to said notes of this date, making the sum of one thousand dollars, and upon the express condition, to wit: that the said Knighton, [Byrd,] his heirs, executors, &c.,

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shall and do well and faithfully perform the covenants hereinafter mentioned, on his part, first to be kept and performed by himself, covenant, promise, and agree to execute and deliver to the said Knighton, a deed, with covenants against his acts, of and for all a certain tract or piece of land lying in the county of, &c.; and the said Knighton doth hereby, for himself, his heirs, executors, &c., covenant, promise, and agree to and with the said Byrd, as follows, to wit: to pay to the said Byrd, his heirs, or assigns, the just and full sum of one thousand dollars; five hundred dollars due and payable on the 25th day of September, 1839; the further sum of five hundred dollars, due and payable on the 25th day of September, 1840. Both notes dated the date of this agreement: payments to be made at Herculaneum, &c." The agreement then, after reciting several covenants, not material in this cause, recites, that "the said Byrd agrees to receipt, on the full payment of the two mentioned notes, two judgments which he holds against Samuel L. Palmer; on the full payment of the notes, from this day the judgments against the said Palmer are to be cancelled, and null and void."

This is precisely the language of the instrument of writing. The defendant also gave evidence that the consideration of the deed above mentioned, and the consideration of the two notes sued on in these two actions, was the same. To the admission of all this evidence, the plaintiff in the action excepted; and the admission of that evidence by the circuit court, is assigned for error.

To sustain the judgment of the circuit court in this cause, the defendant relies on the case of the Bank of Missouri v. Tisson, decided by this court. See vol. I, p. 617. From the report of that case, it appears that Tisson owed the Bank three hundred dollars, for which they held his note, and had sued on it. After making the note sued on, Tisson executed to the Bank a mortgage, in which it was acknowledged that he owed the Bank three hundred dollars. Tisson then, in the mortgage, expressly covenants to pay the said sum of money. It also appears that the note sued on was renewed in pursuance of the understanding in the covenant.

The circuit court, on the motion of Tisson's counsel, instructed the jury that the covenant in the mortgage deed extinguished the note and effected a merger. This court then said we do not think the circuit court committed error in the instruction given. It is well established law, that where a debt exists by simple contract, the taking of a covenant, a bond, or higher security, extinguishes the simple contract debt; and it is also law, that where a debt or duty exist by covenant, that the taking of a less security, gives no cause of action on the new security, unless, indeed, it amounts to a payment, or effects a satisfaction of a previous debt.

But such is not the state of the case in the two causes now before us. The notes sued on by the plaintiff, and the deed given in evidence by the defendant, sprang into existence at the same instant, and by the same act. The notes and deed are parts of the same transaction. The defendant evidently gave the notes as collateral security for the payment of the money. Not more than one half of the covenants contained in that deed have been set out here; and there are now so many set out, that it is evidently a very troublesome business to declare on it. There was no occasion for the defendant to introduce a witness to prove that the notes and the deed related to the same contract; it is evident from their faces, that they are a part of the same transaction. It is also evident that the defendant by giving those two notes intended, or at least pretended, to afford the plaintiff a simpler mode of recovering the money than he would have had by suing on the agreement.

The rules of law are, and ought to be, fixed and permanent. They permit men to contract after their own way, provided their meaning be expressed. It is not at all inconsistent with the rules of law, that the defendant should have given the plaintiff two remedies, either of which he might use to recover this money. He has done so, and he must now abide the consequences of his act.

The judgment of the circuit court will be reversed, because that court suffered the agreement to be given in evidence, to defeat a recovery on the two notes sued on in these actions. The cause is remanded.

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Defendant covenanted with plaintiff for the payment of a certain sum of money, and at the same time, and as a part of the same transaction, gave his notes to plaintiff for the money. Held: That the plaintiff had two remedies; one on the covenant, and the other on the notes, and was at liberty to pursue either.

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MILLINGTON and others v. MILLINGTON and others.

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and others v.
Millington
and others.

In proceedings under the act concerning partition of land, the interests of all the claimants of the land should be set forth and proved.

Error to St. Charles Circuit Court.

CUNNINGHAM for Plaintiffs.

COALTER for Defendants.

Opinion of the Court delivered by Tompkins, Judge.

In the month of August, 1834, Seth Millington died possessed of certain lands and lots in the county of St. Charles, leaving no children, but several brothers and one sister, and their descendants, and also a father; some resident in Missouri, and others non-residents. At the May term of the circuit court for St. Charles county, in the year 1841, Seth Millington, the present defendant in error, and others, claiming in the right of Ira Millington, their father, deceased, a brother of the deceased Seth Millington, filed their petition, praying a division of the lands, &c. of the dec'd Seth Millington. At the November term, for the year 1841, that court made an order directing a partition of the estate, and assigning to each heir and representative his portion, and Jeremiah Millington, brother and one of the representatives of the deceased, being dissatisfied with the share allotted to him, prosecutes this writ of error, to reverse the judgment of the circuit court rendered in the cause. The land which the petitioners wish to divide is thus described:

1st. A tract of land lying in the county of St. Charles, Missouri, in what is called the "Prairie Haute," near the town of St. Charles, containing two hundred and thirty arpens, being five and three-fourths arpens in width, and forty arpens in depth, conveyed by Louis Tayon and wife, to Seth Millington by deed, &c., and described in said deed as bounded on the east and north by lands of Isadore Savage, and on the west and south-west by lands originally granted to Fran-

cois Socier, and on each end by vacant lands, otherwise commons, belonging to the town of St. Charles.

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2nd. A tract of land adjoining the former, of ten arpens or five in length by two in width, conveyed by Daniel Colgan to Seth Millington by deed, &c., and described in said deed as being near the town of St. Charles, and bounded on the end next the town by the commons or vacant land, on the northwardly side by land of the said Millington, on the west by land of Peter Glenday, on the south by land owned perhaps by one Selby.

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Jeremiah Millington, the plaintiff in error, not content with the order of the court, which gives him only the part he is entitled to in his right of heir or legal representative of the deceased, produces, as evidence of his right to a greater quantity of the land, two certificates of the recorder of land titles under an act of congress making further provision for settling the claims to lands in the territory of Missouri.

The first of these certificates is in the words following, to wit: "The claim of Seth and Jeremiah Millington under Charles Tayon, to a lot lying and being in St. Charles common field, containing one arpen front by forty arpens in depth, bounded east by Tayon, under Hebert; west by Charles Tayon; south, by the commons, or domain, and north, by public land, has been duly confirmed."

The second certificate is in these words: "The claim of Seth and Jeremiah Millington, under Charles Tayon, to a lot lying and being in St. Charles common field, containing one arpen front by forty arpens in depth; bounded east by Charles Tayon; west, by Charles Tayon, under Hebert; south, by the commons, and north by public land, has been confirmed, &c."

Both certificates are dated 26th May, 1825. Some evidence was given to prove that Seth Millington in his lifetime admitted the claim of Jeremiah Millington, the plaintiff in error, to a right in the two forty arpen lots confirmed by the recorder of land titles.

But no evidence was given to prove that these two forty arpen lots were part of either of the tracts of land, the par-

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tion of which had been ordered by the circuit court. That court would necessarily require the petitioners to show some evidence of title to the land which they prayed to be divided, and accordingly they produced a deed for the tract first described from Louis Tayon and wife to the deceased, and this deed recites that this land had been conveyed by Charles Tayon by deed of gift to Benoit and wife, and by said Benoit and wife to Louis Tayon from whom the deceased claimed title. It is in evidence then that the title to the two forty arpens lots was derived to Seth and Jeremiah Millington from Charles Tayon, and for any thing here proved, it might have proceeded directly from Charles Tayon to them; whereas, the title to the first described tract of land is derived to Seth Millington, deceased, from Charles Tayon through Benoit and wife, and Louis Tayon and wife. The reasonable presumption, then, is from the evidence before us, that the two forty arpen lots form no part of the tract first above described. Because we cannot presume either that Millingtons would purchase, or that Charles Tayon would sell to them what he had before granted to Benoit and wife. These presumptions necessarily arise from the fact, that the forty arpen lots are not proved to be a part of the first above described tract of land. The second tract consists of ten arpens only, and therefore Jeremiah Millington's claim could not be a part of that tract.

It not being made to appear to this court that the land claimed by Jeremiah Millington as confirmed to him and the late Seth Millington, constitutes any part of the tract of land purchased by the deceased from Louis Tayon, the judgment of the circuit court must be affirmed, and the cause is remanded.

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DUVALL and others v. RAISIN and others, defendants, and
BLAIR & ARCHER, garnishees.

Duvall & others v. Raisin & others, Def'ts, and Blair & Archer, Garnishees.

1. The assent of creditors will be presumed to a deed of assignment made for their benefit, containing no stipulations or conditions prejudicial to their interests. Therefore, where such a deed was made for the benefit of certain preferred creditors, who were named as parties to the deed, but did not execute the same, their assent was presumed, they not being required to execute the deed before receiving the benefit of its provisions.
2. Endorsers are viewed by courts as creditors, and a deed of assignment made for their security is valid, although no payments had been made by them at the time of the execution of the deed.
3. The neglect or delay of the assignee in making out a schedule of assets and liabilities, referred to in the deed as part thereof, will not render the deed inoperative.

Error to St. Louis Court of Common Pleas.

CROCKETT for Plaintiffs.

BLAIR & GANTT for Defendants.

Opinion of the Court, delivered by Napton, Judge.

This was an action of assumpsit by Duvall, Keighler & Co., against H. H. Raisin & Co. An attachment was sued out, and Montgomery Blair and Edward E. Archer, summoned as garnishees; Blair & Archer denied all indebtedness, except such as might be considered as arising from a deed of assignment, made by H. H. Raisin & Co., to them as trustees, by which all the property of said H. H. Raisin & Co. was conveyed to them for the benefit of certain preferred creditors. This assignment was made 24th April, 1841, between Henry H. Raisin, Wiare D. Parsons and John Ward of the first part; Edward E. Archer and Montgomery Blair, of the second part; and the several other persons named in the instrument, creditors of H. H. Raisin & Co. of the third part. The assignment purported to convey all the property of H. H. Raisin & Co. to Blair & Archer, giving them full power and authority to disprove of the same upon a special trust, that after paying the expenses attending the

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Duvall & others v. Raisin & others Defts., and Blair & Archer Garnishees.

assignment, the trustees should apply the monies arising therefrom to the payment of several preferred creditors, enumerating them. This deed was executed by the parties of the first and second part, the assignors and the trustees and Blair, admitted that he had received under this deed, property and effects to the value of five thousand dollars, which he held for the trust purposes specified in said deed. It was specified in the deed, that schedules of the property and of the liabilities of the assignors were annexed to the deed; but, these schedules had not been made out, and were not in fact, attached to the instrument.

Upon this state of fact the judgment of the Court of Common Pleas was for the garnishees, and to reverse this judgment, a writ of Error is sued out.

There are several objections made to the validity of this assignment, which we will proceed to consider.

The assent of creditors will be presumed to a deed of assignment made for their benefit, containing no stipulations or conditions prejudicial to their interests. Therefore, where such a deed was made for the benefit of certain preferred creditors, who were named as parties to the deed, but did not execute the same, their assent was presumed, they not being required to execute the deed before receiving the benefit of its provisions.

1st. It is insisted that the deed is void, because it was not executed by the creditors. Had the creditors, named in the assignment as parties, been required to execute it before they could take the benefit of its provisions, their assent to the deed could not have been signified in any other mode. *Ganard v. Lord Lauderdale*, 3 Sim. R. 1. But where there is no stipulation for a release, or any other condition in the instrument, which is not for the benefit of the creditors, their assent will be presumed. 2 Story Eq. 302. *Drake v. Rogers & Shreenbury*, 6 Mo. R. 320. Deeds of this description are frequently made for the benefit of persons who are absent, and where they are clearly for the benefit of such persons, and no terms are imposed, no expression of the assent of the preferred creditors has been held necessary, in order that the legal estate should vest in the trustee. *Brooks v. Marbury*, 2 Wheat, R. p. 97.

Endorsers are viewed by courts as cred-

2nd. The persons preferred in this assignment were endorsers, and because there is no evidence that the notes of which they were endorsers had been paid, it is argued that they are creditors. The endorsers stand in the position of securities for the assignors, and it has never been questioned, but that money or property could have been placed in their hands to indemnify them against loss. Nor is any reason

perceived why property may not be transferred to a trustee for their benefit. MAY TERM
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To hold an endorser not to be a *creditor*, would certainly be an effectual mode of nullifying all assignments in which preferences are given, as in all, or nearly all of them, the preferred creditors are the endorsers of the debtors, and it seems to be a prevailing opinion in society that they are not only creditors, but creditors that have the highest claims upon the debtor.

3rd. The neglect or delay in making out schedules, if such existed in this case, cannot render inoperative the deed of assignment. The assignee in such cases, may file in equity and compel a delivery of the books and securities. *Keys v. Brush*, 2 Paige, Ch. R. 312.

The court is of opinion that the assignment was valid, and the judgment of the Court of Common Pleas is therefore, affirmed.

making out a schedule of assets and liabilities referred to in the deed as part thereof, will not render the deed inoperative.

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itors, and a deed of assignment made for their security is valid, although no payments had been made by them at the time of the execution of the deed.

The neglect or delay of the assignee in

Opinion of Tompkins, Judge.

I dissent from the court in this case, not because I believe it necessary to the validity of a deed of assignment, that the creditors for whose benefit it is made, should sign it, when they are not required by its terms to sign. The statute itself gives an attachment against a debtor's goods, when he has fraudulently conveyed, assigned, or removed his property, to hinder or delay his creditors. And nobody can doubt that the makers of this deed intended to hinder and delay the plaintiffs in this action, when they made the deed of trust to the garnishees. In the present case I see no reason to believe the existence of fraud, so far then as the garnishees have disposed of any of this property for the benefit of creditors, I am of opinion that their acts ought to be held valid; but, I cannot admit that the effects which they now have on hand, are not liable to be attached for the benefit of creditors not parties to that deed; for, most certainly, that property is still the property of the defendants, and the law considers it constructive fraud to dispose of proper-

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ty so as to hinder or delay creditors. The very act of assigning property for the purposes of that deed, is an attempt to withdraw the property from the operation of legal process, and a trustee is appointed with powers to dispose of the property to whomsoever the defendants may prescribe, whether there be indebtedness or not. But the plaintiff has the privilege of going into a court of equity to disprove the claims of a multitude of creditors of the defendant, instead of dealing with the defendant himself. I do not dispute the right of a debtor to prefer one creditor to another; it would be impracticable to prevent him. But I contend that this right of preference must be limited to such creditors as are actually paid; and that it is no payment of a debt to put property into the hands of an agent to sell it to raise money to pay such creditors. Good morals and sound policy, in my opinion, forbid such a practice. A man whose debt amounted to one hundred, or, even two hundred dollars, could not afford to compete with the number of creditors commonly provided for by such deeds.

CURTIS V. SETTLE.

An affidavit, in attachment, that the "affiant has good reason to believe, and does believe, that the defendant is about to convey his property, so as to hinder or delay his creditors," is sufficient, and it is not necessary to charge fraud in the acts alleged. It is sufficient to follow the words of the statute, and the words of themselves imply fraud. (See act concerning "Attachments," Laws of Mo., session 1838-9, p. 6, sec. 1.)

Appeal from the St. Louis Court of Common Pleas.

KING & MURDOCK for Appellants.

DARBY & KNOX for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

This is an action commenced in the court of common pleas of St. Louis county by Curtis, against Settle. Judg-

ment was given for the defendant in the court of common pleas, and to reverse that judgment the plaintiff appeals.

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The defendant in the court of common pleas moved to quash the attachment on account of the insufficiency of the affidavit, which, after stating the indebtedness of the defendant, is in these words: "And that this affiant has good reason to believe, and does believe, that the said Thomas G. Settle is about to convey his property so as to hinder or delay his creditors."

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v.
Settle.

The defendant in error contends that the affidavit required by the attachment law, under which the attachment in the above cause was issued, should charge fraud where the fact upon which the affidavit is based, is a conveyance of property. The law relied on, is the fourth clause of the first section of the act to amend an act, &c., page 6th of the acts of the session of 1838-9, approved 13th February, 1838. It is in these words: "Fourth. Where the debtor has fraudulently conveyed, assigned, removed, concealed, or disposed of, or is about to convey, assign, remove, or dispose of any of his property or effects, so as to defraud, hinder, or delay his creditors." In the first member of this clause there are five cases in which a plaintiff, by making the required affidavit, may obtain an attachment: they all relate to a fraudulent act already done; first, where the debtor has fraudulently conveyed, where the debtor has fraudulently assigned, or has fraudulently removed his property, &c. In the second member of said clause there are four cases stated in which a plaintiff, making the proper affidavit, may obtain an attachment: first, where the debtor is about to convey any of his property or effects, so as to defraud any of his creditors: second, when the debtor is about to assign any of his property or effects so as to hinder or delay any of his creditors. Again, where the debtor is about to assign any of his property so as to hinder or delay his creditors; and so of the remaining cases.

The affidavit here, is, that the defendant was about to convey his property so as to hinder or delay his creditors. The words, "hinder and delay" are, in my opinion, of the same import, and either would have been sufficient. But the plain-

An affidavit, in attachment, that the "affiant has good reason to believe, and does

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Settle.

believe, that the defendant is about to convey his property, so as to hinder or delay his creditors," is sufficient; and it is not necessary to charge fraud in the acts alleged. It is sufficient to follow the words of the statute, and the words of themselves imply fraud. (See act concerning "Attachments," Laws of Mo. session 1838-9, p. 6, sec. 1.)

tiff has not done amiss to use both. The language is full after the manner of law writers; and it was not necessary to charge fraud in the facts alleged in the affidavit. The words imply fraud. The law, as it protects each individual in the enjoyment of his person and property, requires each member of society to have his property in readiness to be taken in execution whenever a judgment shall be obtained against him, in a court of justice: and he, who conveys to another his property, with intent to hinder or delay his creditor, is guilty of a fraud on that creditor, and indeed, on the law of the land: no less guilty is he who assigns his property with intent to hinder or delay his creditors. By the process of the law he may perhaps have collected for twenty years previous money due to himself from other members of the community, and when he becomes by any casualty himself indebted, if he withdraws his property from the process of the law, by any of the means above mentioned, he becomes a traitor to the community of which he is a member. If an honest man wishes to assign his property, the law for the relief of insolvent debtors furnishes him means of staying the hand of a hard creditor; and any other mode than that prescribed by that law is in itself fraudulent, and it is not necessary that the plaintiff suing out an attachment should charge fraud in express terms, neither the letter nor the spirit of the act requires it.

The affidavit then was good, and the court of common pleas in my opinion committed error in quashing it. Its judgment is therefore reversed, and the cause remanded.

HENRY V. A. & L. FORBES.

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It is the province of the jury to determine what credit is due to the testimony of a witness, and the court will not set aside the verdict, unless it is clearly against the weight of evidence.

Henry
v.
A. & L. Forbes.

Appeal from the St. Louis Court of Common Pleas.

HUDSON for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

This suit was commenced by A. & L. Forbes before a justice of the peace, where judgment being given against Henry. He appealed to the circuit court : from the circuit court the cause was transferred to the court of common pleas. Judgment being again given for the plaintiffs below, appellees here, Henry brings the cause here by appeal, to reverse the judgment of the court of common pleas.

The appellant moved the court of common pleas for a new trial, and that being denied to him, he assigns such denial for error.

On the trial it was proved that the plaintiffs were importers and venders of looking glasses ; that on or about the 15th or 20th of March, 1838, the looking glass, which is the subject of litigation in this cause, was imported by the plaintiffs with the first goods of that season : that he afterwards put the said glass plate into a frame, which he understood belonged to the defendant : that in the spring of the year 1838, or early in the summer of that year, the defendant told one of the witnesses that he had spoken to the plaintiffs to bring him on from New York to the city of St. Louis, a looking glass plate ; that the defendant stated that he understood from his wife that the plaintiffs had sent a looking glass plate to his house in St. Louis in his absence, and that she would not receive it. This evidence being given, the plaintiffs called on the defendant to give evidence. He testified, that in coming over the mountains betwixt Philadelphia and Pittsburg, when migrating to St. Louis, he had two

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large looking glasses, "what are called French plates," in their frames, and one of the plates was broken; that after he arrived at St. Louis, he called on the plaintiffs to fix up the unbroken one; that in the month of December, 1837, when the plaintiffs put up the unbroken plate as aforesaid, he asked them if they would have him one brought on from the east, that would be a match for that which was not broken. The plaintiffs replied that they could; he then asked them if they could have him one brought on by the first of March, 1838; the plaintiffs replied they thought they could. The defendant then told them if they brought him one to the city of St. Louis by the first of March then next, he would take it, and give them for it the sum of fifty dollars upon its delivery, which plaintiffs said they would do. The plaintiffs stated that the plate was to be delivered to him in the city of St. Louis, by the plaintiffs, by the first day of March, 1838, otherwise he would not be bound to receive it; and that upon the agreement being made as aforesaid, the plaintiffs took the said frame from his house, in the said city of St. Louis, to their store, in said city; and that about eight or ten days afterwards he went to the store of the plaintiffs, and told them they need not send for the said plate, because he, the defendant, had received a letter from his father-in-law in Philadelphia, informing him that as soon as the ice was out of the canal in the spring, he would send him a new glass plate by the way of the canal; that to this the plaintiffs answered, he was too late, for they had already sent for the plate for him; that he heard nothing more about the plate until some time betwixt the 25th and the last of march, in the year aforesaid, when he was informed by his wife that the plaintiffs had sent a glass to his house on that day, when he was from home, and that she would not receive it, and told the persons who brought it, to take it back to the plaintiffs; that he never saw said glass plate, and knows nothing of its kind or quality, and that the plaintiffs "never tendered to him by the first of March of the year last aforesaid, and at no time afterwards, before the commencement of this suit, such glass as they contracted to furnish him as aforesaid, or any other glass, except as aforesaid."

The court of common pleas instructed the jury, and its instructions are not complained of; but it is insisted that the jury have found a verdict against the evidence, and that the jury have erred in a matter of law. The statute directs that only one new trial shall be granted to either party except, first, where the triers of the fact have erred in a matter of law; or, second, when the jury shall be guilty of misbehavior.

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There have been, as appears by the record, four verdicts found in this case, by juries, against the defendant; one before the justice of the peace, before whom the suit was instituted; two before the circuit court, both of which last were set aside for the defendant, and a new trial was had before the court of common pleas. In this last mentioned court the jury found again for the plaintiffs. The contract to furnish a glass plate was proved both by the testimony of the defendant, and by his admissions as testified to by another witness. There was no dispute about the quality of the plate, and if there had been, there was evidence that the plate was a good one, and fitted to the frame of the broken plate. But the plate was not delivered on the first day of March, 1838; by which time, according to the testimony of the defendant, the plaintiffs had contracted to deliver it. The plaintiffs proved that it arrived at St. Louis about the 15th or 20th of March of that year, with the first arrivals of spring goods of that season; and it seemed from the evidence, to have been tendered at the dwelling house of the defendant in a few days thereafter. It will scarcely be contended, even by the zealous advocate of the defendant, that the jury had not the liberty and the right to believe or not to believe the whole or any part of the testimony of the defendant, although he was called on by the plaintiffs to testify. They, it seems, believed there was a contract to deliver a glass plate of a particular description; there was evidence to prove the delivery of such a plate. The defendant stated in his testimony, "that the plate was to be delivered to him by the first day of March, year last aforesaid, or else he would not be bound to receive it." The court of common pleas instructed the jury, "If they believed that the contract

It is the province of the jury to determine what credit is due to the testimony of a witness, and the court will not set aside the verdict unless it is clearly against the weight of evidence.

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betwixt the Messieurs Forbes and Doctor Henry was that the looking glass in question should be delivered by the plaintiffs to the defendant on the first day of March, or early in March, and that it was not delivered till the 26th, 27th, or 28th of March, Dr. Henry had a right to refuse to accept it, and the plaintiffs cannot recover on the contract."

It seems, then, that the jury did not believe that the plaintiffs had contracted to deliver the plate so early as the first day of March, or early in March; they might not have believed that as prudent men they would contract to deliver as early in the season as the defendant had stated they did; as it is well known that in some seasons the ice obstructs the navigation of this river so as to prevent such early arrivals of goods from the east. The jury might not for other reasons have given credit to that part of the testimony. In my opinion, the court of common pleas committed no error in refusing a new trial to the plaintiffs in error, and its judgment ought to be affirmed, and the other judges concurring, it is affirmed.

GRANT & FINNEY v. BROTHERTON'S ADMINISTRATOR, to the use of JANNEY.

1. A bond given under a statute, but not following the words used in the act, is nevertheless valid; unless the statute prescribes a form, and declares that all bonds not taken in the prescribed form shall be void.
2. The obligatory part of a bond purported that the obligors were bound in the sum of "*two thousand*." By the condition, it appeared that the bond was taken to secure the forthcoming of property of the value of "*one thousand dollars*." Held: that the bond should read as though the word "*dollars*" were inserted after the words "*two thousand*."

Appeal from St. Louis Circuit Court.

KING for Appellant.

SPALDING and TIFFANY for Appellees.

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1842.*Opinion of the Court, delivered by Napton, Judge.*Grant & Fin-
ney v.
Brotherton's
adm'r. to use
of Janney.

This was an action brought by the administrator of James Brotherton, late sheriff of St. Louis county, on a bond given by the defendants, (plaintiffs in error,) for the forthcoming of property levied on by attachment. This bond is as follows:

"Know all men by these presents, that we, David Grant, as principal, and William Finney, as security, are indebted unto James Brotherton, sheriff of St. Louis county, or his assigns, in the sum of two thousand; for the payment whereof we bind ourselves, heirs, executors, and administrators firmly by these presents, sealed with our seals, and dated this twenty-sixth day of July, in the year of our Lord one thousand eight hundred and thirty-eight.

"The condition of this obligation is such that, whereas, in virtue of a writ of attachment issued from the St. Louis circuit court, returnable to the November term thereof, in the year eighteen hundred and thirty-eight, at the suit of Nathen E. Janney, plaintiff, against David Grant, defendant, the sheriff of St. Louis county has attached certain property and credits, to wit: all the right, title, and interest of said Grant of and to a certain steam boat called the Motto, together with her furniture and tackle, of the value of one thousand dollars, which have been restored on the execution hereof. Now, if the said effects so attached and restored, shall be produced and delivered, subject to the judgment of said court, when and where the court shall direct, then this obligation shall be void, otherwise it shall remain in force.

D. GRANT, (Seal.)

WM. FINNEY, (Seal.)

The defendants cravedoyer, and demurred; but afterwards withdrew their demurrer, and pleaded, First, that the obligation was not taken by the sheriff in pursuance of law, but under color of his office; the bond was given for ease and favor, &c., and was therefore void in law; and, second, that the bond was void in law. To these pleas plaintiff de-

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murred: the demurrer was sustained, and judgment upon the demurrer for the plaintiffs.

The only question is as to the validity of the bond. It is urged that, because the bond does not pursue the words of the statute, it is therefore void. The act of February 6, 1837, provided that "if any property be seized by an officer by virtue of a writ of attachment, the defendant may retain the possession thereof, by giving to such officer sufficient bond and security, to be approved by such officer, conditioned that such property shall be forthcoming, in good order and condition, when and where the court shall direct, and shall abide the judgment of the court."

A bond given under a statute, but not following the words used in the act, is nevertheless valid; unless the statute prescribes a form, and declares that all bonds not taken in the prescribed form shall be void.

It will be perceived, by comparing the bond with the requisitions of the statute, that the bond taken does not go beyond these requisitions, but falls short of them; and so far is more favorable to the party complaining. Nor does the act prescribe any particular form in which the bond shall be taken, or declare that all bonds not taken in the prescribed form shall be void; nor does such an implication arise from the terms of the act, or from the policy which the law designed to promote. *United States v. Bradley*, 10 Peter's Rep. 115. In England, by statute of 23d Henry VI. c. 9, a prescribed form was given to the sheriff, in which to let to bail persons taken on *capias*, and the statute wholly avoided all bonds taken in any other form by color of his office. The plea adopted by the plaintiff in error in this case, is like the pleas used to avoid obligations which fell within the prohibition of this statute. But there is no objection to a bond taken under the statute of this State, if it be a good bond between the parties at common law, and no conditions are prescribed which have been prohibited by statute. The court is therefore of opinion that the bond in this respect is well enough.

The second and most forcible objection to the bond is the blank in the obligatory part. "In every deed there must be such a degree of moral certainty as to leave on the mind of a reasonable man no doubt of the intent of the parties." Is there this degree of certainty here?

In *Cole's administrator v. Hulme*, (8 Barn. and Cress.

568,) a similar omission occurred in a penal bond, and the court held that as it appeared by the condition that the bond was given to secure various sums of money, described as being composed of pounds, &c., it might fairly be inferred, that the penal part of the bond which was given to secure the payment of those sums, should be in the same species of money; and in furtherance of that intention, the word *pounds* was supplied.

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The case now before the court is not altogether that case, but comes within the principle. The obligatory part of the bond purports that the obligors were to become bound in the *sum of two thousand*. It is clear that some species of money was intended; and this may be inferred from the obligatory part of the instrument. And the question is, as it was in *Coles v. Hulme*, whether from the other parts of the instrument we can collect what was the species of money which the party intended to bind himself to pay.

By reference to the condition of the obligation we see that the bond was taken to secure the forthcoming of some property levied on by the sheriff under an attachment, which property was of the value of one thousand dollars. Can there be any reasonable doubt, that the intention of the obligors was, in order to secure property of the value of one thousand dollars, to become bound in a penalty consisting also of *dollars*? If so, the bond should read as though the word *dollars* were inserted.

The obligatory part of a bond purported that the obligors were bound in the sum of "two thousand." By the condition, it appeared that the bond was taken to secure the forthcoming of property of the value of "one thou-

Let the judgment be affirmed.

sand *dollars*." Held: that the bond should read as though the word "*dollars*" were inserted after the words "two thousand."

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BIRCHER v. PAYNE.

Bircher
v.
Payne.

A. gave his notes for the payment of the purchase money of a certain tract of land, and, at the same time, the payee agreed, under seal, that if there should be any suit concerning the land, the notes should not be paid until the same had been "entirely got rid of and cleared away," and then the expenses of the suit were to be deducted from the notes. Held: that this agreement could not be set up in bar to a suit on the notes, as it did not amount to a defeasance or a release. The party aggrieved had his action on the covenant.

Error to St. Louis Court of Common Pleas.

BLAIR and GANTT for Plaintiff.

GEYER & DAYTON for Defendant.

Opinion of the Court, delivered by Scott, Judge.

Bircher, as assignee of one Gonsollis, brought an action of assumpsit against Payne, on a promissory note, dated 25th November, 1836, for the sum of four hundred and eighty-five dollars, payable two years after date. After the general issue, and a plea of set-off, the defendant pleaded three special pleas in bar, growing out of a contract made between Gonsollis, the payee, and Payne, at the time of the execution of the note. The pleas alleged that at the date of the note sued on, Gonsollis, the payee, agreed under seal, with Payne, that, whereas, Payne had given to Gonsollis two notes, dated 25th November, 1836, each for four hundred and eighty-five dollars; payable, one of them in one, and the other in two years after date; the same being part of the purchase money of a tract of land situate in St. Louis county: now, should there be any suit or disturbance concerning the said land, the said notes shall not be paid until the same has been entirely got rid of and cleared away, and then to be deducted from said notes such amount of lawyer's fees and other expenses as said Payne shall pay on account thereof: and that at the same time the said writing obligatory and the said notes were mutually delivered: that afterwards, one Taylor claiming title to said land, adverse to that of

Gonsollis, commenced against said Payne an action of trespass on account of said land, in the St. Louis circuit court, which is now pending: that the said Payne hath retained counsel to defend the same; and that the note sued on is one of the two notes in the said writing obligatory mentioned. There were two other pleas nearly similar to the foregoing. To these three pleas, special replications were filed, which were demurred to, and the demurrers sustained. The plaintiff then took a nonsuit, and sued out his writ of error.

The breach of contract charged in these pleas do not amount to a defeasance, nor to a release. The pleas form no bar to the action. The parties have agreed that this note shall be paid two years from its date, and a separate and distinct agreement, varying the time of performance, not amounting to a defeasance or a release, is no defence to an action brought on the note. If the agreement set up in bar by the defendant is violated to his prejudice, he may have his action. This is like the case of an obligee covenanting not to sue the obligor for a certain time; it does not amount to a defeasance, nor can it be pleaded as such; but is a covenant only for a breach of which the obligor may bring his action. 2 San. R. 47; Atwood v. Lewis, 6 Mo. Rep. The defendant having demurred to the plaintiff's replications, and his pleas being held bad, the judgment will be reversed, and the cause remanded.

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Bircher
v.
Payne.

A. gave his notes for the payment of the purchase money of a certain tract of land, and, at the same time, the payee agreed under seal, that if there should be any suit concerning the land, the notes should not be paid until the same had been "entirely got rid of and cleared away," and then the expenses of the suit were to be deducted from the notes.

Held, that this agreement could not be set up in bar to a suit on the notes, as it did not amount to a defeasance, or a release. The party aggrieved had his action on the covenant.

SMITH v. ROSS and STRONG.

1. The omission of the middle letter of a name is not a misnomer or variance.
2. A judgment rendered against a party who had no notice of the proceedings, is utterly void.

Error to St. Louis Court of Common Pleas.

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1842.

PRIMM for Plaintiff.—ALLEN for Defendants.

Smith
v.
Ross & Strong.*Opinion of the Court, delivered by Scott, Judge.*

Ross and Strong brought an action of debt against Solomon Smith, on a judgment recovered in the county court of Mobile co, in the State of Alabama. On the trial of the issue taken on the plea of nul tiel record, the transcript produced in evidence, showed that John McD. Ross and Thomas Strong were plaintiffs, and that the judgment was rendered against Edwin Haniman and Solomon Smith. Haniman, it seems, was not served with process. Smith, who was served, appeared and entered several pleas. At the trial term, the record states, the parties appeared by their attorneys, and thereupon a jury was sworn, whose verdict was in this form: "We of the jury find for the plaintiffs, and assess their damages, &c." A judgment is then rendered against the "defendants" on which an execution is issued against both Haniman and Smith. On the trial below the plaintiffs had judgment.

The question is, whether there was a variance between the declaration and the transcript offered in evidence. Ross recovered the judgment sued on, by the name of John McD. Ross, and institutes this suit by the name of John Ross. This it is contended is a variance. The declaration does not profess to set out the record in so many words; nor is it so vouched as to hold the plaintiff to the proof of an exact copy. It is said that "McD." is a part of the family name of Ross, and not the initials of a middle name; but from an inspection of the record, we are satisfied that "McD." is not a part of the surname, but the initials of a middle one. Had it been a part of the middle name, the suit might have been abated by plea, and in that way the truth of the assertion might have been tested. In the case of *Keene v. Meade*, 3 Peters, it was said by the supreme court of the United States, that there were cases strongly countenancing, if not fully establishing, that the omission of the middle letter of a name

The omission
of the middle
letter of a name is not a misnomer or variance.

is not a misnomer or *variance*. The same principle has been recognized and sanctioned by this court. 7th Mo. Reports, 263. MAY TERM.
1842.

Another variance alleged is, that the transcript offered in evidence shows that a judgment was recovered against both Haniman and Smith, and the declaration is against Smith alone. If this objection really existed, it would be difficult to surmount. *Rastal v. Stratton*, 1 H. Black. R. Smith
v.
Ross & Strong.

But, from the record offered in evidence, we do not conceive that Haniman had any notice of the proceedings. It is a principle of universal law, that a judgment rendered against a party who had no notice of the proceeding is utterly void. Policy requires that in some instances a judgment, rendered on what is termed constructive notice, should have the force and effect of those obtained after a personal knowledge of the proceedings. But these derive their force and effect from statute law, they have no extra territorial validity, and the comity of the courts of other States is not carried so far as to extend to them any respect. The constitution of the United States declares that full faith and credit shall be given in each State to the judicial proceedings of every other State; but this provision has never been held to extend to judgments rendered against a party without any knowledge of the proceedings. 15 John. 121. A judgment
rendered
against a party
who had no
notice of the
proceedings is
utterly void.

In the case under consideration the return on the process is, that Haniman was not found. Afterwards, when the issues joined by Smith were about to be tried, the record states, the parties appeared by their respective attorneys. We do not think by the word "parties," it was intended to include Haniman. He was no party to the issue about to be tried; his appearance was not required at that time, and if he had appeared and said nothing in defence, as he was no party to the issue, his default would have been noted. It cannot be inferred that because judgment was rendered against Haniman, therefore he had notice. Such an inference would take away entirely the defence of a want of notice of the proceedings. In order to ascertain whether there was notice, reference must be had to the proceedings prior to the judgments; and if it does not appear from them that the party

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was notified, we cannot infer it because a judgment was rendered against him. The judgment against Haniman, according to the principles above stated, being void, the plaintiff did right in regarding it as a nullity as to him, and declaring against S. Smith alone.

Judgment affirmed.

CRINION and others v. NELSON.

A mortgage deed, under the statute of this State, being made only to secure the payment of a debt, may be assigned by writing unsealed.

Error to St. Louis Court of Common Pleas.

KNOX for Plaintiff.

BLANNERHASSET for Defendant.

Opinion of the Court, delivered by Tompkins, Judge.

Nelson sued Crinion in the court of common pleas, where he had judgment, and to reverse that judgment Crinion prosecutes this writ of error.

The proceeding is under the statute concerning mortgages. Crinion executed and delivered to one John H. Taylor a mortgage deed on certain property in the city of St. Louis, to secure the payment of fifteen hundred dollars, and Taylor assigned this mortgage to Nelson, the plaintiff in the inferior court, appellee here; and Nelson brought the suit in his own name, and it is contended by the appellant that the appellee, plaintiff below, could not sue on this mortgage deed, because the assignment was not under seal.

The statute is this, "In all cases of any debt secured by mortgage, the assignee may sue for the recovery of the debt in his own name, setting forth the assignment," &c. See the act of 1839, concerning mortgages. A mortgage deed under our statute, is no more than a bond to pay mo-

ney; which bond it is agreed betwixt the obligor and obligee shall be satisfied out of the money for which a certain parcel of land therein mentioned shall be sold. Judgment being obtained on the instrument of writing sued on, for the money thereby secured to be paid, the act directs that the land shall be sold by the sheriff, the debt satisfied, and the residue of the money, if any, after the debt is satisfied, shall be paid to the mortgagor, or original owner of the land. It is true, that a mortgage at common law must be assigned by writing under seal, because it conveys an interest in the land; but a mortgage deed under our statute, being made only to secure the payment of a debt, may be assigned like a single bill obligatory, by writing unsealed. The judgment of the court of common pleas is affirmed.

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A mortgage deed, under the statute of this State, being made only to secure the payment of a debt, may be assigned by writing unsealed.

BAILEY V. THE BANK OF THE STATE OF MISSOURI.

Where the endorser of a bill of exchange boarded with the drawer, but transacted business in a different house, notice of non-payment delivered to the drawer, was held insufficient to charge the endorser. The notice should have been served on the endorser, or left at his dwelling house, or place of transacting business, or facts shown from which notice might be inferred.

Error to St. Louis Court of Common Pleas.

TODD & KRUM for Plaintiff.

BOWLIN & WOODRUFF for Defendant.

Opinion of the Court, delivered by Tompkins, Judge.

The Bank sued Daniel Bailey, as endorser of a note made to him by William Bailey, and having obtained judgment against him, he now prosecutes this writ of error to reverse the judgment.

The notary testified, that in due time after the dishonor

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v.
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and protest of the note in question, he went to an office which he understood to be that of William and Daniel Bailey; that he found there William Bailey, the maker of the note, and brother of Daniel Bailey, the defendant; that he served the notice on said William; that upon inquiry for Daniel, William told the witness that it was unnecessary to go after Daniel, the defendant, to serve a notice upon him, as he, Daniel Bailey, lived with him, William Bailey, and that the office was the place to leave the notice for the defendant; and thereupon the witness left the notice for Daniel Bailey with William Bailey.

Where the endorser of a bill of exchange boarded with the drawer, but transacted business in a different house notice of non-payment delivered to the drawer was held insufficient to charge the endorser. The notice should have been served on the endorser, or left at his dwelling house or place of transacting business, or facts shown from which notice might be inferred.

William Bailey, being first released, was sworn on behalf of the defendant. He testified, that the notary left a notice of the dishonor of the note with him for the defendant; but that he did not recollect that he told the notary that it was not necessary for him to go after the defendant to serve notice on him; that the defendant then boarded with the witness; that the defendant was then in the city of St. Louis, and doing business as a carpenter, on his own account, and had a shop for that purpose; that he believed he pointed out to the notary the shop of the defendant; that the defendant had no interest or concern in the office of the witness, that he never gave the notice to the defendant, and does not know that the defendant had any knowledge of the dishonor of the note till two or three weeks afterwards; that it being a delicate matter, the witness never talked to the defendant about it; the defendant was a mere accommodation endorser.

The judgment of the court of common pleas being for the Bank, the defendant, Bailey, moved for a new trial, and his motion was overruled, and the refusal is assigned for error. The notice was clearly insufficient. It should have been either served on the defendant, or have been left at his dwelling house, if he had one, or shop where he was employed in his business, or facts being shown from which it might be inferred he had notice. The maker of the note is probably the last person to whom a notice like this should be given. The judgment is reversed and the cause will be remanded.

GAMBLE, Adm'r., de bonis non of Estate of NASH, v.
HAMILTON, Adm'r. of Estate of O'NEIL.

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Gamble, Administrator de bonis non of Nash v. Hamilton, Administrator, of O'Neil.

1. A writ of error will lie upon an order of the County Court, that an administrator "retain all the money of the estate, which may come into his hands. subject to the order of the court, for the purpose of paying all administrators and guardians, such sums as shall be found due from the estate, &c., in preference to all other demands, &c." Such an order amounts to a judgment, and is final and conclusive in its nature.
2. Where an administrator dies in possession of specific property, belonging to the estate of his intestate, and it can be identified as part of such estate, the administrator *de bonis non*, is entitled to the possession of such property; but, if the property cannot be so identified, the administrator *de bonis non* must fall into the class of creditors designated by the administration law.
3. Although it is not stated in the bill of exceptions, that no other evidence; than that recited, was given, &c. Yet, if it can be clearly inferred from the proceedings, that no other evidence was given, it is sufficient.

Error to St. Louis Court of Common Pleas.

POLK & GAMBLE for Plaintiff.

HAMILTON for Defendant.

Opinion of the Court, delivered by Tompkins, Judge.

This case originated in the Probate Court of St. Louis County. The Court of Probate, on motion of Gamble, among other things, made an order on Hamilton, as administrator of O'Neil, who had been administrator of said Nash, to pay over to said Gamble the sum of \$990.83, which, it appeared by the last settlement made with the court by O'Neil in his life time, he admitted to be in his hands for the use of the estate of Nash. Hamilton complied with the order, except only as to that part requiring him to pay over the said sum of money; as to which he reported to the court, that said O'Neil left no money on hand at his death. Thereupon, the court ordered, that said Hamilton retain all the money which might come into his hands from the estate of said O'Neil, subject to the order of the court, for the pur-

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pose of paying all administrators and guardians, such sums as should be found to be due from the estate of the said O'Neil in his character of executor, administrator, &c., in preference to all other demands, which had been or might be established against his estate, to the intent, as declared in said order, that so soon as it should be ascertained that the monies due said O'Neil, and the personal property left by him are insufficient to pay the same, an order should be made for the sale of the real property for that purpose.

Hamilton moved the Probate Court to rescind so much of its order as commanded him to retain money that might come to his hands of the estate of O'Neil, for the purposes aforesaid; that court over-ruled the motion, and the cause was brought to the Court of Common Pleas, by writ of error. In this last mentioned court the order of the Court of Probate was rescinded.

The administrator de bonis non of Nash then moved for a new trial; and his motion being over-ruled, he sued out his writ of error. On the part of the plaintiff in error, it is urged:

1st, That the order of the Probate Court is a mere direction, and is not of the character either to be enforced by process, or appealed from, and until the order of the court is enforced it cannot be either received or reversed.

2nd, that the Probate Court has a general jurisdiction, as well equitable as legal, and under the 34th section of the administration law, could make the order here made.

3rd, That the record does not show what evidence was given before the Probate Court, upon which the order was made, and for any thing appearing on the record, evidence may have been given, that all the property held by O'Neil was purchased with the trust fund.

A writ of error will lie upon an order of the county court, that an administrator "retain all the money of the estate, which may come into his hands, subject to the order of the

On the point made by the plaintiff in error as first above stated, it is to be observed that the order of the Probate Court made in the cause was as final and conclusive as it could be. It amounted to a judgment against Hamilton, as administrator of O'Neil, for so much money of the estate when he should first be in possession of funds; and that it would be too late for him to seek redress from the appellate court, after he should have paid out the money under the order of the

Probate Court. The plaintiff in error here, after redress given to the defendant in error, might have no assets to repay the money received by him under the order of the Probate Court; and, at all events more delay would have taken place.

The writ of error upon any final judgment or decision of any court is a writ of right, and may be sued out as well in vacation as in term time. See digest p. 318, 1st section of the act to regulate practice in the Supreme Court. Since the establishment of the State government, the courts have construed the law liberally, and probably the more so, as writs of error can issue in vacation, and other writs, as mandamus, &c., in term time only. To the second point it may be objected that the first section of the fourth article of the administration law, directing how demands against the estate of a deceased person shall be classed, and the 21st section of the same article directing such demands to be paid as they are classed, do in my opinion, restrict the equitable jurisdiction of that court to the course then prescribed.

There can be no doubt, that had the money, reported by O'Neal to be on hand belonging to estate of Nash, when he made his last settlement with the Probate court, been found in his box after his death, by his administrator, in such state that it could be identified; but the administrator *de bonis non*, ought to be put into the possession of it as readily as if it were a horse, or any other article of personal property; here, we are told by the administrator, and his statement is admitted to be true, that there was no money left on hand by said O'Neil at the time of his death, nor was there any in his possession to enable him to comply with the order of the court.

The administrator of Nash, must then fall into the class of creditors to which the statute assigns him. As to the third point, it may be observed that although it is not said in so many words that no more evidence was given before the Probate Court, than what appears in the bill of exceptions; yet, it is plainly to be inferred, that no other evidence was given. That court first made an order to the administrator, to deliver over the property of Nash deceased, and the

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court, for the purpose of paying all administrators and guardians such sums as shall be found due from the estate, &c., in preference to all other demands, &c." Such an order amounts to a judgment, and is final and conclusive in its nature.

Where an administrator dies in possession of specific property belonging to the estate of his intestate, and it can be identified, as part of such estate, the administrator *de bonis non* is entitled to the possession of such property; but if the property cannot be so identified, the administrator *de bonis non* must fall into the class of creditors designated by the administration law.

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money, viz: \$990,83, which, O'Neil at his last settlement had reported to be on hand.

The record, then, shows that O'Neil's administrator, obeyed the order, except paying over the money, stating that he had found none left on hand by O'Neil: "Thereupon," it is stated, "the court further ordered, that the said Alexander Hamilton retain all monies which might come into his hands

Although it is not stated in the bill of exceptions, that no other evidence, than that recited was given &c. Yet if it can be clearly inferred from the proceedings, that no other evidence was given, it is sufficient,

from the said estate, subject to the order of the court, for the purpose of paying all administrators and guardians, such sums as should be found to be due from the estate of the said Hugh O'Neil in his capacity of executor, administrator, &c." We are warranted in supposing that this order was made by the court, in consequence of the report of O'Neil's administrator, that all the property was delivered up, and that no money was found; for, it is stated that "thereupon," the court made the order; or, on this state of facts the court ordered. But we are precluded from believing that all O'Neil's property was purchased with the trust fund by the very character of the order. Had his property been purchased with the money belonging to Nash's estate, it is impossible to believe that the court of Probate would have been so weak as to order on that account, that the money to be raised from the estate so purchased should be kept to pay not only the sums due to Nash's administrator, but also, "for the purpose of paying all administrators and guardians, such sums as should be found due from the estate of said O'Neil, in his capacity of administrator or guardian, &c." That court evidently made the order under the belief that the administrator of Nash, and other administrators in like situation, ought to be preferred creditors. The Court of Common Pleas, then, committed no error in rescinding the order of the Probate Court. Its judgment is, therefore, affirmed.

SHREVE V. WHITTLESEY, Adm'r. of WHITTLESEY.

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1. The term "*beyond sea*," in the first section of the statute of "Limitation," of 1825, means "out of the State" (Napton, Judge, dissenting.)
2. Where an immaterial issue, tendered by the plaintiff, was found for the defendant, and it appeared from the record, that the awarding a repleader was not necessary to effect substantial justice between the parties, the court properly gave judgment for the plaintiff, *non obstante veredicto*.

 Shreve
v.
Whittlesey,
adm'r of
Whittlesey.

Error to St. Louis Court of Common Pleas.

BLAIR & GANTT for Appellants.

ALLEN for Appellee.

Opinion of the Court delivered by Tompkins, Judge.

Whittlesey brought this action, on a promissory note, against Shreve. Shreve pleaded the statute of limitations. To this plea the plaintiff replied, first, That at the time when the said cause of action accrued, the plaintiff was beyond sea, to wit, at Louisville, in the State of Kentucky, and that he brought his action within ten years after his return to this State. To this replication the defendant demurred, and the court gave judgment on the demurrer for the plaintiff.

The plaintiff filed a second replication, by leave of the court, to this plea, tendering an immaterial issue, and this issue being found for the defendant, judgment was entered up for the plaintiff *non obstante veredicto*.

It is contended that the court erred, first, in giving judgment on the demurrer for the plaintiff; and second, in entering up judgment for the plaintiff, on the issue found for the defendant.

The statute of limitations of 1825, in force when this note here sued on was made, has this proviso to the first section: "That if any person entitled to any of the before mentioned actions, shall, at the time the cause of the action accrued, be within the age of twenty-one years, &c., or beyond sea, or absent from the United States, such person may bring such action within such times as are before limit-

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ed, after the respective disabilities are removed." It is contended that the words of the statute "beyond sea," are to be construed literally, and consequently that a residence in Kentucky is no bar to that statute of limitations.

Angel, in his work on limitations, says, that the meaning of the expression "beyond seas," in the statutes of limitations in these States, seems to be, that "beyond seas," and out of the State, are analogous expressions, and must have the same construction. He cites several authorities. See his work, p. 219. The counsel of the defendant admits the current of authorities to be strongest in favor of that construction, when the words are unqualified, and contends that the time is qualified in our statute by words used in the proviso of the third section of the same act, viz: that the persons enumerated in that section may, notwithstanding "the twenty years be expired, sue, &c. provided, that such person or persons shall within twenty years next after attaining full age, &c., or coming into these United States, sue for the same." For the purposes of persons, such as are provided for in the second and third sections of the act, the statute begins to run against them after their return to the United States. But such is not the proviso in the first section, which provides for a different class of suitors.

The term "beyond sea," in the first sec of the statute of "Limitation," of 1825, means "out of the State."

That act has now been repealed about eight years, and but one case decided under it has been cited in the argument of this cause; that is the case of *King v. Lane*, decided in this court at the September term, 1841, p. 241 of the 7th vol. Mo. R. This cause being one of some importance, was twice argued, and at two several terms, and the counsel on both sides acquiesced in construing the term "beyond sea" to signify "out of the State." For myself, individually, I never entertained a doubt that such was the meaning of the legislature; but however I might be disposed to give the law a different construction, if it were now in force, I do not feel disposed now to disturb its repose by giving it a different construction from that which has heretofore been acquiesced in.

Where an immaterial issue, tendered by

As to the second point, that the court erred in entering up for the plaintiff a judgment *non obstante*, &c. Mr. Chitty

says, "When an issue is immaterial, the court will order a repleader, if it will be the means of effecting substantial justice between the parties, and not otherwise; and where in debt on bond, the defendant pleaded performance generally, and the plaintiff replied, denying the performance, and concluding to the country, stated breaches by way of suggestion, instead of replying to them. After verdict for the plaintiff, a repleader was awarded, such issue being insufficient.

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Whittlesey.

In this cause, the plaintiff tendered in the first replication a good issue, and the defendant by his demurrer admitted the truth of the facts; and joined issue on the bad replication. The court, by ordering a repleader in the case, would not advance the cause of justice, in as much as the plaintiff could not plead that matter well. He has judgments on several other pleas, and it would not advance the cause of justice to send him back to the court of original jurisdiction, and thereby enable the defendant longer to deprive the plaintiff of the benefit of his judgment. The judgment of the court of common pleas is affirmed.

the plaintiff,
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between the
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gave judgment
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Opinion of Napton, Judge.

I am of opinion that the words "beyond sea," in the act of February 21, 1825, mean what the words literally imply. The construction given to those words in England, or in other States of this Union, cannot have sufficient weight to counterbalance the construction which the legislature of this State has given to these words in the very act itself. The third section enumerates the same disabilities as the first, and instead of speaking of the removal of these disabilities in general terms, such as were used in the first section, it proceeds to describe particularly in what way each disability could be removed. The counterpart to the words "beyond seas," is the phrase "by coming into the United States." The legislature have not varied the disabilities described in the third section, from those enumerated in the first; nor is there any reason why they should be different in real actions from what they are in personal, except in point of time. The words "beyond seas," then in the third section, the legislature have

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themselves interpreted to mean "without the United States," and I see no way in which a similar construction of the same words in the first section can be avoided.

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The evidence in this case not being preserved in a bill of exceptions, the court affirmed the judgment.

Error to St. Louis Court of Common Pleas.

DARBY & KNOX for Plaintiff.

Opinion of the Court, delivered by Scott, Judge.

This was an action of trespass, *quare clossum fregit*, commenced by Langham against Bernarder, before a justice of the peace. Langham obtained a judgment in the justice's court, from which Bernarder appealed to the court of common pleas of St. Louis county. On a trial *de nova* in that court, Langham again obtained a judgment, to reverse which this writ of error is sued out.

The evidence in this case not being preserved in a bill of exceptions, the court affirmed the judgment.

It appears from the bill of exceptions that Bernarder, in order to show title in himself, or those under whom he claimed, produced in evidence a deed from one Duncan to Langham, subject to a written agreement. Neither the deed nor the agreement is set out in the bill of exceptions. The judgment of the court below must be presumed to be correct until it is shown to be otherwise. The evidence not being preserved in the bill of exceptions, the judgment must be affirmed.

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SYKES v. THE PLANTERS' HOUSE and INSURANCE COMPANY MAY TERM.
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SAME v. SAME.

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Plant. House
and Ins. Co.
of St. Louis.

Where a party seeks to consolidate suits on accounts, and to dismiss the suit so consolidated for want of jurisdiction in the justice, and appeals from the decisions of the justice against him thereupon, he will be held to strict proof of the pendency of the several suits before the justice.

Appeal from the St. Louis Circuit Court.

BLAIR & GANTT for Appellant.

DRAKE for Appellees.

Opinion of the Court, delivered by Tompkins, Judge.

The Planters' House, &c. sued Sykes before a justice of the peace. The justice gave judgment against him, and he appealed to the circuit court, and that court giving judgment against him, &c., appeals to this court.

From the transcript of the justice's docket on the record of the circuit court, it appears that the suit was founded on an account for sums due on two shares of the stock of the company, subscribed and owned by Sykes, due, respectively, January 1st, 1840, January 20th, 1840, February 20th, 1840, and March 10th, 1840.

We have before us another record from the same court, of a suit of the same date, betwixt the same parties, on an account for sums due on two shares of the said company, &c., due, respectively, April 20th, May 20th, August 1st, and September 1st, 1840, and in each case there is a bill of exceptions, in each of which it is stated that the defendant admitted his subscription to the stock of the plaintiffs, and his indebtedness as stated in the cases. The defendant moved the court to consolidate the said suits into one, and dismiss the suit so consolidated for want of jurisdiction in the justice, in as much as all the arrearages upon which said suits were founded, grew out of the same subscription to the

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same stock, &c. The court overruled the motion and gave judgment for the plaintiffs.

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Louis.

Where a party seeks to consolidate suits on accounts, and to dismiss the suit so consolidated, for want of jurisdiction in the justice, and appeals from the decision of the justice against him thereupon, he will be held to strict proof of the pendency of the several suits before the justice.

This court has decided that in suits on notes they will not compel justices to consolidate several demands founded on notes, but will suffer them to be sued on separately and at the same time. See *Martin v. Chauvin*, 7th Mo. Rep. 271; and *Barnes v. Holland*, 3d Mo. Rep. 49; *Wheat*. 47. What the court might do in the case of two several suits, evidenced by an account only, is not now necessary to be decided. If on any occasion it could be done, this is perhaps such a one; as the several sums become due by instalments, and there is little danger of confusion ensuing. It is sufficient to say, that it does not appear on either record, otherwise than by recital, that there are two suits pending in court betwixt the same parties.

The justices' courts are established for the use and convenience of the plaintiffs and defendants, and the law establishing them ought to be liberally construed. It is not pretended that there is any statute requiring justices to consolidate suits. The circuit court might dismiss suits founded on accounts, where the plaintiff shows a disposition to vex and harass the defendant, but on this subject I give no opinion; it would be extrajudicial. The advantage which the appellant seeks here, is to be derived from a strict construction of the law, amounting to a technicality, and as he has not strictly proved his right to have these suits dismissed, even if this court should be of opinion that two suits on account would not be proceeded in before a justice betwixt the same parties, at the same time, the judgment of the circuit court will be affirmed.

HENSLEY v. DODGE, Administrator of DODGE, dec'd.

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The same points are decided in this case as in the case of McNair v. Dodge, surviving administrator of Dodge. Ante, p. 404.

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Dodge, Admr.

Appeal from the St. Louis Circuit Court.

GEYER for Appellant.

Opinion of the Court, delivered by Napton, Judge.

Henry Dodge, surviving administrator of Israel Dodge, deceased, brought an action of detinue against Margaret S. McNair, to recover the possession of three slaves, named in the declaration. The defendant pleaded, first, *non detinet*; second, limitation of five years; third, *ne unques* administrator, and fourth, that the plaintiff was not lawfully possessed of said slaves, or either, as alleged in the declaration. The fourth plea was demurred to, and the demurrer sustained. Issues were taken upon the other pleas, and were all found for plaintiff, and judgment rendered accordingly.

On the trial, the plaintiff gave in evidence letters of administration, granted the 26th September, 1806, by John Bte. Valle, judge of probate for the district of Ste. Genevieve. These letters purported to issue to *Harry* Dodge and George Bullitt, and to be under the seal of the probate court of said district, though only a scrawl, with the word seal written within it, was annexed. A deposition of said Valle accompanied the letters, stating, that the letters were issued by him as judge of probate; that *Harry* Dodge, is the same Henry Dodge who is now governor of Wisconsin; that George Bullitt is dead, and that the seal attached to the letters was his private seal, no seal of office having been provided.

The same points are decided in this case as in the case of McNair v. Dodge, surviving administrator of Dodge. Ante, p 404.

The plaintiff then gave in evidence a marriage contract between Israel Dodge and Catharine Camp, widow of Jean Bte. Guion, acknowledged before Ch. D. Delassus, the Lieut. Governor of Upper Louisiana, on the 17th January, 1804, and proved by John Ruland, the recorder of St. Louis county, that this paper was among the Spanish archives deposit

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ed in his office ; that it was indexed as such by his predecessor in said office, and had been among said archives ever since he, the witness, had been recorder, until it was brought into court upon the trial. Endorsed on the back of said paper, is a certificate of said recorder, that the same was filed for record on the 5th September, 1837. By the provisions of the contract the slave Violette, the mother of the slaves sued for, was given to the wife during her life, and if she died without children, to revert to the husband, Israel Dodge, and his heirs.

It was further proved that the marriage was afterwards consummated ; that said Israel Dodge and his wife resided at Ste. Genevieve, in the district of Ste. Genevieve, until the death of said Dodge in 1806 ; that no child was born of said marriage ; but that Dodge had several children by a former marriage, among whom was Henry Dodge, the plaintiff.

It was proved that Mrs. Dodge claimed the negro woman, Violette after the death of her husband, and continued in possession of her and her children for several years, until in the year 1830, she sold and delivered the slaves to the plaintiff in error. There appears to be no dispute about the *bona fide* character of the sale, and that it was made for a valuable consideration : it is therefore unnecessary to set out the testimony offered on that point.

The judgment of the circuit court is sought to be reversed because of the admission of illegal testimony, and because, admitting the facts to be as found, the law arising from them is for the plaintiff in error.

The act of October 1, 1804, was in force in the territory when these letters were granted. That act provided for the appointment of a judge of probate in each district, whose duty it was to take proof of last wills and testaments, and to grant letters testamentary, and letters of administration. The fourth section provided, that the judge should record last wills and testaments, and *make entries* of the granting of letters testamentary and letters of administration ; but no provision is made for recording letters of administration, or letters testamentary, nor is any particular form prescribed in which such letters were to be issued. See Hempstead's

Dig. p. 125. The act of January 20, 1816, provided, that "all letters of administration, and letters testamentary, heretofore granted in pursuance of any law in force in this territory, shall be recorded in the clerk's office of the circuit court of such county," and the clerks are directed to certify on said letters that the same have been recorded according to law. It was further provided by this act, that no letters of administration, made before its passage, should be admitted in evidence in any court of law or equity, unless they were recorded in the manner directed by that act. The thirteenth section of the act of 1822, merely provides that all letters testamentary and of administration, before they are delivered to the executor or administrator, shall be recorded, and the clerk shall certify on the letters, that they have been so recorded. It further declares, that letters, unless so recorded and certified, shall not be received in evidence. This provision is substantially the same with that which was adopted in the revision of 1825, and in the subsequent revision of 1835.

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The act of 1816 is the only one containing any retrospective provision, and, the section containing that provision was not re-enacted in the act of 1822, nor in any subsequent act. The act of 1816 is not now in force; that act was not intended to extinguish any *rights* which had accrued under the act of 1804, but merely to furnish a rule of evidence. The repeal of that law is therefore a repeal of the rule; and there is nothing in the present administration law which appears to be designed to operate on proceedings had under former laws, with a view to affect their admissibility in evidence. The act of 1822, as well as the subsequent laws on the subject of administration are merely directory of the forms to be observed under them, and they must be construed like other laws not to intend a retrospective operation.

The letters of administration granted by John Bte. Valle in 1806, must then be regulated by the act of 1804, which was in force when the letters issued. It has been seen, that the law of 1804 did not require the letters to be in any particular form, nor did it require them to be under seal, or to be recorded, nor was there any thing in the unwritten law

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then in force in this territory, which required such letters to be under seal.

It has been objected by counsel, that there is no proof of any delivery of these letters to Dodge, the administrator; but the court are of opinion that his possession of these letters is at least *prima facie* evidence of that fact, and no proof being offered to rebut that presumption, it must be held conclusive.

I am not aware of any statute of limitation which bars the right of action by an administrator, or renders null his letters. In this case, it is clear that there could have been no final settlement of all the estate and interests of Israel Dodge until after the death of his widow, when certain reversionary interests for the first time became available to his administrator.

The admissibility of the marriage contract in evidence, is a point that was not much insisted on in the argument. This contract was what has been termed by the supreme court of the United States, an authentic act; it is a solemn agreement entered into by the parties, before the Lieut. Governor of the province, in the presence of the relations and friends of both parties, by all of whom, together with the public officer, it is attested. I am satisfied without reference to our act of assembly of February 1, 1839, concerning evidence, some of the provisions of which may provide for this case, that upon general principles, such an instrument must be admissible in evidence, whenever accompanied with satisfactory proof of its genuine character. The certificate of the recorder, that it has been duly recorded in his office, is *prima facie* proof that the original produced with such certificate endorsed, came from the archives of the Spanish government, because the recorder is only authorised to record such documents as are found in the archives, and to give out the original to any party interested. But in this case, we have the additional testimony of the recorder, that the paper offered in evidence was found in the Spanish archives, and so marked and filed by his predecessor in office, and that the same had never left the archives until it was brought into court on the trial.

A more serious question is raised upon the effect of this document in relation to notice. The act of December 22, 1824, declares that all marriage contracts heretofore entered into, may be recorded in the like manner as such contracts hereafter entered into; and from the time of recording the same, shall, as to all property affected thereby within the county in which it is recorded, impart full and perfect notice to all persons, of the contents thereof; and no such marriage contract, which shall not be recorded within six months after the taking effect of this act, shall be valid or binding, or in any wise affect any property, real or personal, (except between the parties thereto, and such as have actual notice thereof,) until the same shall be deposited with the recorder of the county, wherein such property is situate, for record. If this provision was intended to embrace marriage contracts made before the change of government, it is clear that the plaintiff below was not entitled to recover, without proof of actual notice. But I am led to the belief that this was not the design of the act, for several reasons.

In the first place, if the marriage contract, before the 10th March, 1804, was a solemn public act, attended with all the forms prescribed by the laws and usages of Spain, and imparted notice to all the world, it is not very clear that the legislature of this State could impair or anywise alter or modify the rights which had accrued under such a contract. Whether the legislature had any power to pass a law of this character however is a question upon which I mean to intimate no opinion of my own, much less of the court; but it is sufficient that such a question would arise. The probability of raising a question of this kind presents a strong ground for believing, that if the legislature in passing the act of 1824, had in view marriage contracts entered into under the former government, they would have embraced such contracts in express terms. But the language of the act may be entirely operative without affecting the contracts under the Spanish government. It will embrace all contracts made since the 10th March, 1804 up to the passage of the act.

Moreover a vast deal of property, both personal and real, as is well known, is secured by these Spanish documents, de-

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posited in the Spanish archives. Yet the legislature in all their acts relating to these papers, appear to have aimed merely to facilitate their introduction as evidence in our courts, but have in no instance (unless this clause in the act of 1824 be one,) attempted to modify or restrict the rights acquired under them, or to impose new terms upon the parties interested. They appear to have been viewed as at least *quasi* records; and it is difficult to see, how any transfer of them to *books* of record, kept and made up in the American style, would give them any additional validity.

Hence, the acts of assembly *authorising* not *requiring* their record, appear to have been designed solely to make them more accessible, and more easy of proof. If the act of 1824, concerning marriage contracts, was designed to embrace such as were made prior to the change of government, it is an entire anomaly in the history of our legislature; and for that reason, I cannot give it such a construction, when its terms are completely carried out by a more limited construction.

Entertaining this view of the effect of the marriage contract between Israel Dodge and his wife Catharine, it is unnecessary particularly to review the instructions of the court. The instructions given embodied the correct principles of law applicable to the facts of the case; and there was no error in refusing those asked by the defendant. Some stress has been laid on the long possession of Catharine Dodge, which was upwards of thirty years; but upon the construction which the court is disposed to give to the marriage contract, it is clear that her possession was not adverse. No rights accrued to the representatives of Israel Dodge until the death of the widow, which was less than five years before the institution of this suit.

Another fact may be considered a fair argument in favor of this construction. It is known that these marriage contracts are chiefly in a foreign language; and when the act of 1824 was passed, there existed perhaps twenty counties in this State, nine-tenths of the population of which were totally unacquainted with their languages. The recording of these Spanish contracts would, therefore, have been a so-

lemn mockery of notice, unless the legislature had also provided for their translation.

Judgment affirmed.

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Collier & Pettus v. Budd.

COLLIER & PETTUS v. BUDD.

The bona fide vendors of a bill of exchange, on which the endorsement of the payee is forged, are entitled to notice of the dishonor of the bill. To entitle the holder to recover from the vendors, he must use reasonable diligence: What is reasonable diligence, must depend upon the circumstances of the particular case.

Appeal from St. Louis Court of Common Pleas.

GEYER for Appellants.

GAMBLE for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

Some time early in the month of March, 1839, Collier and Pettus sold to Budd a draft for one thousand dollars. This being found to be endorsed in the name of the payee, without his authority, Budd, in the month of July, 1841, commenced this suit against them, to recover the money which he had paid them for the draft. He obtained a judgment against them in the court of common pleas, and they now appeal to this court to reverse the judgment. The draft is as follows:

"Cashier Canal Bank, Albany, pay to the order of Elisha Bentley, &c. one thousand dollars, at the Bank of the State of New York."

After Budd bought the draft he wrote over the name of Elisha Bentley, endorsed on the back of the draft, these words: "Pay to the order of John B. Budd." The draft was afterwards endorsed by several others. It was enclosed in a letter, addressed to Collier & Pettus, by William D. Aber-

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nathy, at that time postmaster at Augusta, Hancock county, Illinois, and he was admitted to be then of good reputation. Abernathy professed to be the agent of Bentley, and requested this draft, with two others of five hundred dollars each, to be sold by the defendants, and the money to be sent by mail to him at his office. This was done accordingly. Collier and Pettus admitted that they received two per cent. premium on the draft: and it was proved that they did much business in the way of buying and selling bills of exchange. In short, it does not appear that there was any thing of unfairness or impropriety of conduct in the whole affair on either side.

The defendants prayed the following instructions:

First, If the jury believed from the evidence that the plaintiff had good reason to conclude from what took place between the plaintiff and defendants, that the defendants did not intend to be responsible for the genuineness of the draft, or of its endorsement, they must find for the defendants.

Second, If they believed from the evidence that the defendants on selling the draft were mere agents; that at the time they disclosed to the plaintiff their principal, and that they had paid over to that principal the money received for the draft, before they knew of the forgery of the endorsement, then they must find for the defendants.

The defendants asked other instructions not thought material to be noticed.

These instructions were refused, and the court instructed the jury, that if they believed that the defendants were dealing in the buying and selling of bills of exchange; that the plaintiff applied to them for the purchase of a bill; that the bill in question was bought by the plaintiff from the defendants; that he paid them for it the amount of such bill, with two per cent premium, and that the endorsement of Elisha Bentley is a forgery, they will find for the plaintiff, unless they believe that it was the agreement at the time, that the defendants should not be responsible for the genuineness of the draft, or of its endorsement. The defendants excepted to the instructions given, and to those refused.

The defendants counsel insist, that when a man passes a

bill by delivery, he does not make himself responsible for its goodness. To sustain this position, *Fenn v. Harrison*, 3 Term Rep. p. 759, is cited. That case, and others cited, refer to genuine bills, not forged bills, nor to genuine bills, the first endorsements of which are forged. If the bill be genuine, and endorsed by the payee, the bearer may be supposed to take it on the credit of the maker and payee. But it does not necessarily follow, that the bearer has received it with the risk of its being forged; nor does it seem to me that, because the defendants are dealers in bills of exchange, and receive a compensation for them, they are therefore liable when they sell a forged bill. The merits of the case must turn on the right a vendor may have in any case to notice of the dishonor of a bill, the endorsement of which is forged, as in this case. No authorities in point have been produced.

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In the case of the Bank of the United States v. the Bank of Georgia, a case to which I am referred by Judge Scott, it was decided, that the Bank of Georgia was guilty of negligence, in holding for nineteen days forged notes of its own, which had been paid in by the Bank of the United States, 10 Wheaton, 333. It was held that the Bank was bound to know her own notes, and ought to have informed the Bank of the United States in a shorter time. Mr. Justice Story says, "We may lay out of the case all consideration of the point, how far the defendants would be liable if these notes had been the notes of any other bank, deposited by the plaintiff in the Bank of Georgia as cash. The modern authorities, certainly, do in a strong manner assert, that a payment received in forged paper or base coin is not good; and if there be no negligence in the party, he may recover back the consideration paid for them, or sue upon his original demand;" and he cites authorities. "The holder," he says in another place, "after a considerable lapse of time may not be able to ascertain from whom he received them, or the situation of the other parties may be essentially changed."

Even in relation to forged bills of third persons received in payment of a debt, (he adds,) there has been a qualification engrafted on the general doctrine, that notice and return

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must be within a reasonable time; and any neglect will absolve the payee from responsibility.

If, in the language of Mr. Justice Story, we apply the doctrine of negligence to the present case, there are circumstances strong to show a want of due diligence on the part of the plaintiff in this cause. This draft was sold to him two years and nearly six months before the commencement of this action, which is the first evidence of notice to the defendants. In the meantime Abernathy, who appears to have been a man of fair character, and filling a responsible office under the government, may have absented himself from the United States; his circumstances, if he still reside in the State of Illinois, may be essentially changed. And it may be asked, had the plaintiff, and those to whom he may be responsible in this affair, no better means of knowing of this forgery of the endorsement of Bentley's name, than the defendants? It cannot be presumed that in so long a time, this bill has not been presented for payment at the bank where it was made payable. "H. W. Frigen, teller," is endorsed on the draft, and the witnesses examined say, that they understand by this endorsement that the draft has been paid at the bank of which this man is teller. The presumption then is, that he was teller of the bank where the draft was payable; and the bank officers must be presumed to know the signature of Bentley, its customer; or at all events, to have the best means of knowing it, and of detecting the forgery. It does appear to me probable that the draft was presented for payment in less than three months. Bentley, the payee, apparently residing in Illinois, would probably in less than three months after that draft was sold by Collier and Pettus in St. Louis, have informed the bank of his failure to receive the draft by mail, and in that event his name on the bill would have been presumed to be forged, and consequently we should not have seen the name of the teller on it. But independently of the teller's name, the presumption is strong that the bill was presented for payment in a short time after it was sold by the defendants; and if in any case, the fair vendors of a forged bill, or of a genuine bill the endorsement of which is forged, be entitled to notice, the de-

The bona fide vendors of a bill of exchange, on which the endorsement of the payee is forged, are entitled to notice of the dishonor of the bill. To entitle the holder to recover from the

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defendants in this cause may fairly claim it. It is not sufficient, MAY TERM. 1842. in my opinion, to preclude them from the right of notice, that they were dealers in the buying and selling of bills of exchange, and that they receive a premium. No evidence is seen on the record to warrant the instructions asked by the counsel of the defendants, but the court of common pleas, in my opinion, committed error in giving its own instruction to the jury. The jury ought, it is thought, to have been told, that reasonable diligence should have been shown by the plaintiff, or those who endorsed after he transferred it; and what is reasonable diligence, may depend on the circumstances of the particular case.

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The judgment of the court of common pleas is reversed, and the cause remanded.

Opinion of Scott, Judge.

On the authority of the case of the Bank of the United States v. the Bank of Georgia, I am in favor of reversing the judgment of the court below.

(Judge Napton, dissenting.)

BUFORD & HENDERSON V. SMITH.

If a creditor, whose debt is secured by mortgage, proceeds under the act concerning mortgages, and the whole of the mortgage premises are sold in satisfaction of part of the debt, he cannot, afterwards, proceed against the same lands in the hands of a purchaser, in order to obtain payment of a part of the same debt, thereafter becoming due.

Appeal from St. Louis Court of Common Pleas.

PRIMM & TAYLOR for Appellants.

BATES for Appellee.

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Opinion of the Court, delivered by Scott, Judge.

Buford & Henderson v. Smith.

Smith filed his petition in the court of common pleas for St. Louis county, under the statute concerning mortgages, alleging, that Buford had made to him a mortgage on certain lands, situate in St. Louis county, to secure the payment of two promissory notes, executed by Buford to Smith, for the sum of \$1,250 each, one payable one year and the other two years after date; that the last of the said notes had become due; and prayed that judgment might be rendered for said debt; that the equity of redemption might be foreclosed, and the mortgage property sold to satisfy the amount due.

Henderson & Buford, the defendants below, pleaded in bar, that heretofore, in the same court Smith, under the statute concerning mortgages, had filed his petition for a foreclosure of the equity of redemption of the lands in the mortgage in the plaintiff's petition mentioned, for the purpose of paying the first of the two notes described by the plaintiff in his petition. That a judgment for the said debt, was rendered against the said Smith, and an order made for the sale of the said lands, to satisfy the said debt; that, in pursuance of said order, an execution issued and the said lands sold by virtue thereof, to Geo. Henderson, the defendant, for the sum of \$1,351, who received a deed from the sheriff for the said lands, upon payment of the said purchase money. To this plea, a demurrer was filed. The demurrer was sustained, and a judgment rendered for the plaintiff, from which the defendants appealed to this court.

If a creditor, whose debt is secured by mortgage, proceeds under the act concerning mortgages, and the whole of the mortgage premises are sold in satisfaction of part of the debt, he cannot, afterwards, proceed against the

We can find nothing in the statute concerning mortgages, which, would warrant the opinion, that if a creditor, whose debt is secured by a mortgage, will proceed under its provisions, and sell the whole mortgaged premises in satisfaction of a part of the debt, that he can afterwards, proceed against the same lands, in the hands of a purchaser, in order to obtain payment for a portion of the same debt, thereafter becoming due. With equal propriety, if the first sale did not yield enough to pay the debt for which it was made, the creditor might take the lands away from the purchaser, and

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sell them to a second purchaser, and so *toties quoties*, until the debt was satisfied. MAY TERM,
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If the party will at one time sell all the mortgaged premises, and they do not bring enough to pay his debt, this should satisfy him that his security is insufficient, and not that he can sell the land a second time. It does not seem that the judgment in this cause meets with any support from the principles governing courts of equity, in decreeing a foreclosure of the equity of redemption of mortgaged premises. Baford & Henderson v. Smith.

In England the practice is by bill in chancery, to obtain a foreclosure of the equity of redemption, whereby the lands become the absolute property of the mortgagee. There, if the equity of redemption of mortgaged premises is foreclosed, and they are not sufficient to satisfy the debt, and an action at law is brought to recover the deficiency, this, it has been held, will open the foreclosure and let in the equity of redemption, if the mortgagee has not in the mean time disposed of the land, for it would be inequitable that the right of redemption should be revived against a purchaser. 4 Kent's Com. 183. So it has been held that if a party whose debt is secured by mortgage, will proceed at law on his bond, and sell the land under execution, the purchaser will hold the same free from the lien of the mortgage. 1 Peron 44. So likewise it has been holden, that if the mortgaged premises are sold to satisfy the debt secured by them, and the mortgagee becomes the purchaser, and afterwards brings an action for a balance of the debt remaining unpaid, the mortgagor will not, even against the mortgagee, much less against the third person, who had become a purchaser, be entitled to the foreclosure opened, and the equity of redemption revived. *Lausing v. Gorlet*, 9 Cowens, 346.

Judgment reversed.

MAY TERM 1842. HOOPER impleaded with MADDUX & HILL, v. PRITCHARD.

Clark Hooper
impleaded
with Maddox
& Hill, v.
Pritchard.

Same decision as in the case of Powells v. Thomas. Ante. p. 440

Error to St. Louis Court of Common Pleas.

HAMILTON for Plaintiff.

BLAIR & GANTT for Defendant.

Opinion of the Court, delivered by Scott, Judge.

(Peter & Joseph Powel v. Thomas.)

David Thomas instituted an action of assumpsit against P. & J. Powel on a promissory note, of which the following is a copy :

St. Louis, March 1st, 1839.

Six months after date, I promise to pay to the order of David Thomas, eight hundred and seven dollars and sixty-one cents for value received, with interest at the rate of ten per cent per annum, from due until paid.

THOMAS L. FONTAINE.

On the back of the note, the names of P. & J. Powell were endorsed in blank, and they were charged in the declaration as the makers of the note. On the trial, the court below instructed the jury, that Thomas L. Fontaine was the party originally liable on the note, and that P. & J. Powell were his securities. There was a verdict and judgment for Thomas, the plaintiff below, from which P. & J. Powell have appealed to this court.

The question is whether P. & J. Powell are to be regarded as securities to the note? This is a case of the first impression on this court, and it must be admitted, is not without its difficulties. Cases from the English and American books have been cited, which show that an endorsement like that in the present case, has been regarded by some courts as evidence of an undertaking of one character, and by other courts as evidence of another and different undertaking. All admit that the party making the endorsement, is bound in some way or in some event, but a contrariety of

opinion prevails as to the time and manner of the liability attaching. Should the endorser's liability be varied from that intended by him at the time of making the endorsement, he must attribute the consequences to his own neglect, as it was in his power to define his undertaking with precision. What, then, is the nature of the undertaking of a party who endorses a note in blank payable to another? The position of the name or the instrument would seem to signify that he was only to be held as endorser, but if that was the intention, he should have been the payee of the note, as otherwise he could not by the endorsement, transfer the legal interest in the note. In the case of *Moies v. Bird*, 11th Massachusetts Reports, 440, similar to the present one, the court says, "it was plain the defendant intended making himself liable in some way. Had the note been made payable to him, and negotiable in its form, the plaintiff would have been restricted to such an engagement written over the signature as would conform to the nature of the instrument. In such case, the defendant would have been held as endorser, and in no other form, for such must be presumed to have been the intent of the parties to the instrument. But this note was not made payable to the defendant, and therefore, was not negotiable by his endorsement. What, then, was the effect of his signature? It was to make him absolutely liable to pay the contents of the note. He puts his name upon a note payable to another, knowing he could not be considered in the light of a common endorser, and that he was entitled to none of the privileges of that character. He leaves it to the holder of the note to write any thing over his name which might be considered not to be inconsistent with the nature of the transaction. The holder chooses to consider him as a surety, binding himself originally with the principal, and he has a right to do so. If he was a surety, then he may be sued as original promissor."

We have taken the liberty to transcribe this passage from the opinion delivered in the above cause, as embodying our own views, and as containing the most reasonable interpretation of the intent of the party making an endorsement similar to that in the cause now under consideration. Many

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other cases might be cited from the same reports, supporting this view of the subject. See 13, John. 175. The case of Baker and Briggs, Sth Pickering, is an authority to show that where the contrary does not appear, it will be presumed that the execution of the note, and the making the endorsement were cotemporaneous acts. The party making the endorsement is regarded as being privy to the consideration, and it will be presumed, that it was taken on the faith of the endorsement, and he will not be heard in objecting the want of consideration for his endorsement. This, we hold is the light in which a blank endorsement made by a party who is not the payee of a note is to be regarded, if nothing to the contrary appears. The real contract of the parties may be shown, but in the absence of all proof the foregoing are the principles by which we think courts should be governed in determining the liability of a party, who, when not a payee or endorsee will make a blank endorsement on a promissory note. Carver v. Weaver, 5 Massachusetts, 546. There being another cause before the court involving the same question, on a note negotiable, we are of opinion that the doctrine stated above, is applicable as well to notes which may be negotiable like inland bills of exchange, as to notes which are not negotiable. Judgment affirmed.

Opinion by Tompkins Judge.

I believe that the Powells ought not to be regarded as makers of the note sued on.

MUSICK v. MUSICK.

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v.
Musick

1. In suits commenced before a justice of the peace, where the plaintiff proves his demand, by the defendant, the latter will not be allowed at the same time, to prove, by his own testimony, a set-off claimed by him against the demand. The defendant is placed in the same situation, by the statute, in which a plaintiff is, who seeks to establish his demand by the oath of the opposite party, before either can prove his demand or set off by his own oath, the other party must be called upon to testify. (See Justice's courts, Art. 5th, sect. 16, R. S. 1835, p. 361.)
2. A parol promise, that if plaintiff would give B time on a judgment obtained against him, defendant would see the judgment paid, is a collateral undertaking to pay the debt of another, and within the statute of "contracts and promises."

Appeal from the St. Louis Court of Common Pleas.

POLK for Appellant.

HUDSON & HOLMES for Appellee.

Opinion of the Court by Napton, Judge.

This was an action before a justice of the peace, which, by appeal, was transferred to the court of common pleas, for St. Louis county. On the trial before the court of common pleas, the plaintiff proved his account by the defendant; whereupon, the defendant's counsel offered to prove, by cross-examination, a set-off claimed by defendant, but this, the court would not allow.

The defendant then proved by another witness, that the plaintiff (defendant in error) told witness, that in consideration the said defendant, in case of judgment obtained in his favor against John Munday, before James C. Musick, a justice of the peace, would give the said John Munday time on said judgment, he the said plaintiff, Volney C. Musick, would see said judgment against said Munday paid, and that D. R. Musick, did accordingly give time to said Munday on said judgment.

The court of common pleas gave judgment for the plaintiff, and defendant filed his motion for a new trial, for the reason, that the verdict was against law and evidence, and

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Musick.

In suits commenced before a justice of the peace, where the plaintiff proves his demand by the defendant, the latter will not be allowed at the same time to prove, by his own testimony, a set-off claimed by him against the demand. The defendant is placed in the same situation by the statute, in which a plaintiff is, who seeks to establish his demand by the oath of the opposite party, before either can prove his demand or set-off by his own oath, the other party must be called upon to testify.

(See Justice's courts, Art. 5, Sec. 16, R. S. 1835, p. 361.)

A parol promise, that if plaintiff would give B time on a judgment obtained against him, defendant would see the judgment paid, is a collateral undertaking to

against the weight of evidence. The court overruled the motion, and judgment went for plaintiff.

The plaintiff in error, relies chiefly, on two grounds for reversing this judgment, first, it is objected that the defendant was not allowed to swear to his own set-off. His right to

do so, is placed upon the general principle, that where a

party is made a witness for one purpose, he becomes a witness for all purposes. Page v. Hanky, 6 Mo. Rep., 433.

This is the general doctrine, but our statute regulating this matter provides, "If there be no evidence given to establish any demand founded upon contract, or to establish any set-off,

or if the evidence given be insufficient for that purpose, the

justice, may upon the application of the party offering such demand or set-off, order the opposite party to be sworn as a

witness in relation thereto, if the party called on refuse, the

justice shall allow the party offering the demand or set-off

to be sworn, &c." Sec. 16, p. 461. By this provision the

defendant, wishing to prove his set-off, is placed in the same

situation in which he is, who seeks to establish his demand, and

before either can prove their own demands or set-off, the opposite

party must be called. The court is of opinion, that

no error was committed by the court of common pleas in

refusing the cross-examination proposed.

The judgment of the court of common pleas is also sought

to be reversed. because the court refused the plaintiff in

error a new trial. Admitting that the defendant's proof of

set-off was sufficient to entitle him to a verdict, the proof

having gone to the jury without objection, yet would this

court reverse the judgment for the purpose of letting in a

defence which must be unavailing? The promise of Volney

C. Musick was a collateral undertaking to pay the debt of

another, and being within the statute was of no validity,

and it is not perceived how the plaintiff in error could derive

any benefit from a reversal of the judgment.

Judgment affirmed.

pay the debt of another, and within the statute of "contracts and promises."

FERGUSON, surviving partner, &c., v. TURNER.

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1. Mere negligence on the part of the payee in not suing, or in giving time to the principal debtor, will not discharge the security : but if the payee has a specific lien on the property of the debtor, sufficient to satisfy the debt, and voluntarily surrenders that lien, or loses it by his own negligence, the security will be discharged.
2. A new trial will not be awarded, when it is evident that the party could derive no benefit thereby.

Ferguson
v.
Turner.

Error to St. Louis Court of Common Pleas.

CROCKETT for Plaintiff.

SPALDING & TIFFANY, for Defendant.

Opinion of the Court, delivered by Napton, Judge.

This was an action brought by Taylor and Ferguson against Turner, as endorser of a negotiable note. The defendant pleaded non assumpsit, and a special plea, alleging that after the maturity of the note, Taylor & Ferguson, by a legal and binding contract with Chambers, the maker of the note, granted an indulgence of four months to the maker, Chambers, without the knowledge or consent of said Turner, and thus legally precluded themselves from coercing the payment of said money from said Chambers. To this plea there was a replication, and issue taken.

The issues were found for the defendant, whereupon the plaintiff applied for a new trial, which was refused. No instructions were asked or given at the trial.

The testimony is preserved by the bill of exceptions, and the first point raised here, has been upon the sufficiency of the notice of dishonor. There is much testimony on this point, but as it seems to the court, that the other point raised is with the defendant in error, it becomes entirely unnecessary to examine the notice of protest. The testimony on this head will not, therefore, be detailed.

The proof under the issue on the special plea was, that Chambers, the maker of the note, having confessed judgment at the July term, 1840, a fieri facias was issued, and placed in the

Mere negligence on the part of the payee in not suing, or in

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Turner.

giving time to the principal debtor, will not discharge the security: but if the payee has a specific lien on the property of the debtor, sufficient to satisfy the debt, and voluntarily surrenders that lien, or loses it by his own negligence, the security will be discharged.

A new trial will not be awarded when it is evident that the party could derive no benefit thereby

hands of the sheriff. Chambers had property subject to this execution, amply sufficient to satisfy the judgment. Before the return day, the plaintiff, at the instance of Chambers, directed the writ to be returned unsatisfied, and took a deed of trust upon Chambers' property, subject to the execution, to secure the payment of the judgment within four months from the date of the deed.

This deed the plaintiff neglected to have recorded, and in a short time the whole of Chambers' property, including that covered by the deed of trust, was swept away by executions from other quarters.

Mere negligence on the part of the principal in not suing, or in giving time to the debtor, has never been held to discharge the security. Upon this position the plaintiffs in error rely to reverse the judgment; but the plaintiffs in error have, according to the testimony, done something more than given time to Chambers. They surrendered a specific lien, by which the debt was perfectly secure, and without consent of the security. Shall they, after such conduct, be permitted to go upon the security? Admitting the deed of trust was a perfect nullity, and so it was for all valuable purposes, they had chosen to sue the debtor, which they were not obliged to do, and had prosecuted that suit to judgment. Execution had issued, and was in the hands of the sheriff, a lien upon the personal property of the debtor. This lien they voluntarily discharge, without consideration; this they had no right to do. The security, so soon as the lien of the execution attached, was interested in the retention of that lien, and the discharge of the lien discharged the security.

The second plea pleaded by the defendant was not sustained by the proof, and the issue might well have been found for the plaintiffs; but as the facts proved constituted a good defence, under the general issue, there is no reason for reversing the judgment and allowing a new trial from which the plaintiff in error could derive no benefit.

Judgment affirmed.

MATTINGBY V. CLINE.

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It is not necessary to entitle a plea in any court, as the plea will be considered as having reference to the declaration, which must necessarily be in the same court as the plea ; but if the plea is entitled in the "county court," it will not be considered as having reference to a declaration filed in the "circuit court."

Mattingby
v.
Cline.

Appeal from St. Louis Circuit Court.

KING & MURDOCK for Appellant.

NABB & HOLMES for Appellee.

Opinion of the Court, delivered by Scott, Judge.

Mattingby brought an action of replevin against Cline for a mare. Cline appeared, and filed two pleas ; first, that he did not take the mare, and tendered an issue ; secondly, that the property in the mare was in himself, and concluded with a verification. These pleas were filed at the July term, 1840, and entitled in the St. Louis county court ; and, afterwards, at the July term, 1841, the plaintiff was nonsuited for failing to reply to the second plea, and appealed to this court.

We are not apprised of any statute or principle which requires that a plea shall be entitled in any court, and the omission of the statement of the court, does not seem to be material, as the plea would be considered as having reference to the declaration, which must necessarily have been in the same court as the plea. Chitty's Pleadings, 582. Had the plea in this cause not been entitled, it should have been allowed the benefit of this presumption. But as it was entitled, and entitled in the St. Louis county court, it could not be considered as having reference to a declaration filed in the St. Louis circuit court. The plaintiff, after the plea was filed, never took any step in the cause, from which it could be inferred he waived the irregularity.

The defendant then having no plea on the record, which the plaintiff was bound to notice, was not in a situation to call on the court to nonsuit him. He had committed the

It is not necessary to entitle a plea in any court, as the plea will be considered as having reference to the declaration, which must necessarily be in the same court as the plea, but if the plea is entitled in the 'county court,' it will not be considered as having reference to a declaration filed in the circuit court.

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Cline.

first blunder; the plaintiff had never waived it by any subsequent proceeding; it was then with a very ill grace that he asked the court to nonsuit the plaintiff for not replying to a plea which he was not bound to notice.

Judgment reversed.

DIDER and others v. COURTNEY.

In a plea, in the nature of a plea in abatement, in attachment, (Laws of Missouri session 1838-9, p. 6,) it is not necessary to put in issue the goodness of the plaintiff's reasons for his belief. (Scott, Judge, dissenting.)

Appeal from St. Louis Court of Common Pleas.

KING & MURDOCK for Appellants.

GEYER & DAYTON for Appellees.

Opinion of the Court, delivered by Tompkins, Judge.

In this case, an attachment was issued by the plaintiffs against the defendant, returnable to the February term, 1842. On the seventh day of January, 1842, the plaintiffs filed their affidavit, stating the indebtedness of the defendant; and the affiant stated, that he had good reason to believe, and did believe, that the defendant was about to remove his property out of the State of Missouri, so as to hinder or delay his creditors.

The defendant filed a plea, in the nature of a plea in abatement, as provided by the statute, which denied that at the time the affidavit was made, he was about to remove his property or effects out of the State of Missouri, so as to hinder or delay his creditors. The Jury on the trial found the issue for the defendant, and the plaintiffs appealed to this court.

On the part of the plaintiffs, evidence was given to prove that the defendant, on the 25th November, 1841, shipped some boxes of goods for New Orleans, on board a steamboat, and that they were attached on board of that boat.

On the part of the defendant, it seems to be admitted that he had intended to forward his goods to Baltimore for the benefit of his creditors ; but that a day, or perhaps three days, before the issuing of the attachment, he had abandoned the plan, and concluded to make arrangements with his creditors in St. Louis.

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Dider & others
v.
Courtney.

The court instructed the jury, that if they believed that he intended to remove his goods from the State, that the effect of that removal would be to hinder and delay the creditors of the defendant, and in such case they must find for the plaintiffs. That if they believed that the defendant had intended to remove his property, but had abandoned his intention before the attachment was issued, then they must find for the defendant.

The plaintiffs take all objections, and contend most strongly that the issue was not good, and that the jury found against evidence. It is contended that the defendant's plea ought to have put in issue, whether the plaintiffs had good reason to believe what they had sworn to. How far I might be willing to go to support such a plea, if the statute had not directed what must be the issue, it is not necessary to say. The eleventh section of the act of 1839, permits the defendant to file a plea in the nature of a plea in abatement, putting in issue the facts alleged in the affidavit. Now, unless facts exist on which to base the good reasons of the plaintiff, he cannot have good reason to believe, although he may believe. It is not probable that the simple declaration of the defendant would have satisfied an intelligent jury that he had abandoned his design, unless there were other evidences of the reality of the abandonment. I see nothing objectionable in the instructions given by the court, and nothing so preponderating in the evidence as to induce me to believe that the court of common pleas committed error in refusing a new trial. Its Judgment is therefore affirmed by a division of the court in opinion.

In a plea, in the nature of a plea in abatement, in attachment, (Laws of Mo. session 1838-9, p. 6,) it is not necessary to put in issue the goodness of the plaintiff's reasons for his belief.

Opinion of Scott, Judge.

I do not concur in this opinion, as in my view, the goodness of the party's reasons for his belief should have been the issue.

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FOOXE V. THE STATE.

Foose
v.
The State.

The power of the circuit court to assess and declare the punishment in criminal cases is merely contingent, and only to be exercised in case of a failure of duty, or disagreement of the jury. It is erroneous, therefore, to instruct the jury that they "have the right and authority to return a general verdict of guilty, without assessing any punishment." (See R. S. 1835, p. 493, Title, "Practice and Proceedings in Criminal Cases" Art. 7, sec. 4.)

Appeal from the St. Louis Criminal Court

HUDSON & HOLMES for Appellant.

Opinion of the Court delivered by Napton, Judge.

The appellant was indicted by the grand jury of St. Louis county for a felonious assault, and was tried and convicted. On the trial before the criminal court, the jury retired to consider of their verdict, and on the following day returned into court, and said they could not agree. The court enquired of the jury if they desired further instructions, or differed on a point of law : to which they responded in the negative. Before the jury left the court, the court, at the instance of the circuit attorney, instructed the jury, "that they had the right and authority to return a general verdict of guilty, without assessing any punishment."

The power of the circuit court to assess and declare the punishment in criminal cases is merely contingent, and only to be exercised in case of a failure of duty or disagreement of the jury. It is erroneous, therefore, to instruct the jury that they "have the right and authority to return a general verdict of guilty, with-

This instruction was objected to by the prisoner's counsel, and exceptions taken to the opinion of the court, and its propriety appears to be the only question on which the opinion of this court is desired.

The act regulating practice in criminal cases provides, that where the jury find a verdict of guilty, and fail to agree on the punishment to be inflicted, or do not declare such punishment by their verdict, the court shall assess and declare the punishment, and render judgment accordingly.

This law imposes on the jury the duty of inflicting the punishment, nor has the court any right to fix the punishment, unless the jury disagree, or do not by their verdict inflict any punishment. But the court in this case, told the

jury in substance, that this was no part of their duty, and they had authority to bring in a general verdict. Whereas the power of the court is merely contingent, not primary, and only to be exercised where a failure of duty, or a disagreement on the part of the jury requires its exercise.

Judgment reversed.

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v.
The State.

out assessing any punishment." (See R. S. 1835, p. 493, Title "Practice and Proceedings in Criminal Cases." Art. 7, sec. 4.)

SARPY V. PAPIN.

1. Ejectment. Plaintiff claimed under a patent from the United States, dated 15th June, 1826. The defendant claimed under the act of congress of July 4th, 1836. Held: that as the latter act expressly excepted lands that had been surveyed and sold by the United States, the patent, whether valid or not, must prevail against the defendant, claiming under the act of congress. The act of July 4th, 1836, was clearly a gratuity, and as such, congress chose to prescribe the terms on which their bounty could be obtained.
2. A patent may be void, because it is issued without any authority of law, or by an officer not authorised by law; or, because the title was not in the United States: or, perhaps, where the land has been expressly reserved from sale; but the validity of the patent cannot be impeached by one resting on a mere naked possession, and the defendant here, so far as this principle is involved, stands only on his possession. (See *Hunter v. Hemphill*, 6 Mo. R. p. 106.)

Error to St. Charles Circuit Court.

Opinion of the Court, delivered by Napton, Judge.

This was an action of ejectment brought by Papin against Sarpy, to recover a tract of land in St. Louis county. The plaintiff gave in evidence a patent from the United States, dated 15th June, 1826, and a plat of survey; and proved that the defendant was in possession at the commencement of the suit. The defendant gave in evidence the proceedings of the board of commissioners on the claim of Pierre Francis Davolsey to the land in dispute, recommending the same for confirmation; and the claim was confirmed by act of congress of 4th July, 1836. Notice of this claim was

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filed with the recorder of land titles on the 28th November, 1802.

Depositions were read, showing that Davolsey had cut wood and grass upon the land in 1769, and several succeeding years, but had never inhabited or cultivated the same. The claim of one Brazeau, which was confirmed by act of congress of 4th July, 1836, was also read in evidence. Letters from the commissioner of the general land office, directing the register and recorder of the land district in which the land in dispute was located, to reserve from sale all land made fractional by unconfirmed private claims, were also read in evidence. These letters were dated in September, 1823, and were found on file in the records of the land office at St. Louis.

On the motion of the plaintiff, Papin, the circuit court instructed the jury, that the patent of Papin was a better legal title than the claims of Davolsey and Brazeau, as confirmed by the act of 4th July, 1836. The defendant asked the court to instruct the jury that the patent of Papin vested in him no title. This instruction was refused.

No other questions are presented here, except such as arise on the instructions, and facts preserved by the record. The instruction given by the court involves a simple inquiry between the rights accruing by the act of 4th July, 1836, and those conferred by a patent for the same land in 1826. The second section of the act of 4th July, 1836, provides, "that if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had been previously located by any other person or persons, under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title to such lands, in opposition to the rights acquired by such location or purchase, but the individual or individuals whose claims are hereby confirmed, shall be permitted to locate so much thereof as interferes with such location or purchase, on any unappropriated land of the United States. &c."

Ejectment.
Plaintiff claimed under a patent from the United States,

It is contended on behalf of the defendant, that this section only embraces such sales and locations as were made in strict conformity to law. Let us see how this construction

would stand with the known intent and object of the law. The whole history of national legislation on the subject of these claims, evinces the willingness of congress to part with the title of the United States, without looking narrowly into the merits of claims, provided they can do so without compromising the rights of third parties. This act, like others of a similar character, was clearly a gratuity, and, as such, congress chose to prescribe the terms on which their bounty could be obtained. Liberality to the claimants was not designed to work the grossest injustice to others equally meritorious. It was not intended to invest the claimants with a title by which they could immediately eject another claimant, who had the additional merit of having paid his money into the public treasury, and obtained his patent. It mattered not, whether that patent was valid or not; so far as any title was invested by the act of 1836, that patent could not be avoided. Any other construction would defeat the design of congress. If the locator, or patentee, had an unimpeachable title, he needed no aid from congress, and any reservation in his favor would have been useless. Moreover, it appears that ever since the year 1811, these claims have been expressly reserved from sale, except, perhaps, during one or two short intervals in 1826 and '30. No regular and legal locations, or entries, could therefore have been made; and yet congress, with a full knowledge that numerous locations had been made on these claims, (for the fact had been communicated by the board of commissioners,) and with their own previous enactments before them, reserving these lands from sale and location, enacted the second section of the act of 1836, stipulating for the security of the locations and sales, and making ample provisions for the rights or claims confirmed, by giving the claimants a choice of equivalent portions of the public domain.

The court is therefore of opinion that the instruction given by the circuit court was correct.

In relation to the instruction which the court refused to give, at the instance of the defendant, we must look into the record and see if the facts preserved therein would have authorized the court to declare the patent void. A patent may

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dated 15th
June, 1826.
The defendant
claimed under
the act of con-
gress of July
4th, 1836.
Held, that as
the latter act
expressly ex-
cepted lands
that had been
surveyed and
sold by the
United States,
the patent,
whether valid
or not, must
prevail against
the defendant,
claiming un-
der the act of
congress. The
act of July 4th
1836, was
clearly a gra-
tuity, and, as
such, congress
chose to pre-
scribe the
terms on
which their
bounty could
be obtained.

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be void, because it is issued without any authority, or by an officer not authorised by law; or, because the title was not in the United States. If the decision of the supreme court of the United States, in *Wilcox v. McConnell's lessee*, (10 Peter's R.) is to be considered as settled doctrine in that court, we may also add that where lands have been expressly reserved from sale, an entry of such lands with the register and receiver is void. But, as in that case, the purchase had not been consummated by the issuing of a patent, we are left to conjecture whether the court would have applied their principles to a patent issued under circumstances similar to those in which this entry was made. The question was noticed by this court in the case of *Hemphill v. Hunter*, (vol. 6, p. 106, Mo. R.) but not decided; nor do I think it necessarily involved in the determination of this case. It was however held in this last case that a stranger, resting on mere possession, should not go behind an entry, for the purpose of showing that in the preliminary stages of the title the subordinate officers of the government had not complied with the law, a fortiori; such investigations could not be allowed to impeach a patent.

In this case, it seems from the record, that when the patent issued, the land was public land. The act of 26th May, 1824, by its provisions in the 5th and 7th sections, declares, that this land on the 26th May, 1826, should be held public land, and liable to be sold like any other public lands of the United States. It was conveyed by patent on the 16th June, 1826. It was not reserved land at the time of this conveyance. Proof that this land was entered previous to the 26th May, 1826, or, in other words, that the negotiations between the agents of government and the purchaser in relation to this sale, the payment of the money, and the transfer of the certificate, took place at a time when, by law, such proceedings were irregular and illegal, would seem essentially to conflict with the spirit of the rule adopted by this court in the case of *Hemphill v. Hunter*. These are the very irregularities within the meaning of that rule, which should not be permitted to invalidate the title of a purchaser, when attacked by one who pretends to no title himself, other than what

A patent
may be void,
because it is
issued without
any authority
of law, or by

possession gives him. Such I take to be the law, where the contest is between a stranger to the title and the patentee; and Sarpy, so far as the present branch of the inquiry is concerned, stands only on his possession. These observations will apply to the instructions issued by the direction of the Secretary of the Treasury, to the land officers, in 1823. These instructions were based upon the law of 1811, and designed to carry out the provisions of that law. When these claims were brought into market in 1826, the instructions necessarily became no longer applicable, and whether superceded or not is of no consequence to the rights of the plaintiff. The act of 13th June, 1812, has also been relied on to show the invalidity of this plaintiff's patent. If the claim of Davolsey was confirmed by this act, it is clear that the patent was void, and the court should so have instructed the jury. Yet no instruction directly touching this title under the act of 13th June, 1812, appears to have been asked of the circuit court; and the very scanty and unsatisfactory character of the testimony on this head would appear to have presented a narrow ground upon which to base so broad and decisive an instruction. One or two witnesses deposed, that in 1769, and for some years thereafter, Davolsey was in the habit of getting firewood and cutting prairie grass on the land, but neither occupied or cultivated it. I apprehend that the act of 1812 contemplated something more than a bare possession in law, or such possession as by the common law was supposed to follow title, and the facts deposed to would not of themselves constitute any species of possession, except under certain circumstances, when they might amount to a constructive possession. On this point there is nothing on the record to warrant this court in reversing the judgment of the circuit court. An outstanding title in the school commissioners is also suggested as affording a sufficient reason for warranting the instruction which the defendant asked of the circuit court. There appears to be nothing in the record to support this position.

Judgment affirmed.

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an officer not authorised by law; or because the title was not in the United States, or, perhaps, where the land has been expressly reserved from sale, but the validity of the patent cannot be impeached by one resting on a mere naked possession, & the defendant here, so far as this principle is involved, stands only on his possession. (See Hunter v. Hemphill, 6. Mo. R. p. 106.)

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DECISIONS
OF THE
SUPREME COURT OF MISSOURI.

FIRST JUDICIAL DISTRICT,

AUGUST TERM, 1842.

WADE v. SCOTT.

1. In an action on a promissory note, given for the price of an article sold the defendant, in case of fraud or breach of warranty, may give evidence, shewing the true value of the article sold, in diminution of the stipulated price.
2. Plaintiff sold to defendant a slave with a written warranty, that he was sound, "with the exception of a small defect in his hands." It appeared that the slave's hands were in such a condition, as to render him almost worthless to the purchaser: Held, that this was such a misrepresentation of the extent and violence of the disease, as amounted to a breach of the warranty, and might be given in evidence, in an action for the stipulated price of the slave, in diminution of such price.
3. The right of counsel to commence or conclude an argument to a jury, depends on the practice and discretion of the circuit courts; and such practice and discretion will not be revised or controlled by the supreme court. (Tompkins, Judge, dissenting.)

Appeal from the Boone Circuit Court.

KIRTLEY for Appellant.

HAYDEN for Appellee.

Opinion of the Court, delivered by Scott, Judge.

This was an action, by petition in debt, on a promissory note, executed by Pierce Wade to Isaac C. Scott, for the

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Wade v. Scott. Wade's defence was fraud, misrepresentation, and a breach of warranty. On a trial, Scott obtained judgment for the amount of the note. It appears from the bill of exceptions, that Scott sold to Wade a slave, with a written warranty that he was sound, with the exception of a small defect in his hands. A very short time after the sale, the slave's hands were in such a condition as to prevent his making any use of them. They had lost their muscular action, and were incapable of grasping any thing. In the opinion of some, so great was the defect in the slave's hands, that he was not regarded as worth any thing. Scott had possession of the slave but a short time before he sold him to Wade, during which, there was evidence going to show that his hands were not in such a state as prevented his doing work. Wade saw the slave's hands before the sale, and examined them; and was told that the injury they had sustained proceeded from cold. The physician who examined the slave's hands after the sale to Wade, doubted whether the defect was real or pretended, they being full and natural in their appearance: and it was not until he had required the slave to use his hands in various ways, that he became satisfied that he was utterly unable to perform any thing with them. There was evidence of an offer to rescind the contract, made by Wade to Scott, some time after the sale.

One of the points presented for determination, is, whether

In an action on a promissory note, given for the price of an article sold, the defendant, in case of fraud or breach of warranty, may give evidence, shewing the true value of the article sold, in diminution of the stipulated price. In an action on a promissory note, given for the price of an article sold, a defendant may give evidence, shewing the true value of the article sold, in case of a fraud or breach of warranty, in diminution of the stipulated value of the article. It must be confessed, that this question has been decided in different ways by the courts; and that there is a weight of authority and learning on either side of it, which will relieve a court of any anxiety, in being found either in maintaining or denying the principle. When the authorities are thus divided about a proposition; and when a court will be sustained in taking either course in regard to it, considerations of policy and convenience should determine its choice. It is more reasonable, that when a suit is brought

to recover the price of an article, that any reduction of the stipulated price to which the defendant may be entitled, either from a fraud or breach of warranty in the sale, should be made in the action in which the price is sought to be recovered, than that he should be driven to his cross action for a redress of the injury. This course avoids circuitry of action. A second suit about the same matter should not be tolerated, where a fair opportunity can be afforded by the first, to do complete justice to the parties. And when individuals are apprised, that this defence will attach to the security they may receive for an article sold, they will be less eager to obtain an advantage in their contracts, than if they are taught that a note when once given must be paid, and the injured party driven to his cross action for redress. Many would submit to the imposition, sooner than redress themselves by a suit, who would readily make a defence, were it permitted in an action for the price of an article, in the sale of which they have been wronged. The better opinion seems to be, that this defence will not be allowed, unless the party relying on it, has previously given his adversary notice that he would insist on it at the trial. In a cross action, the party against whom the defence is used, would be apprised by the declaration of the nature of the demand: and as this defence is substituted for the cross action, he is equally entitled to notice, otherwise he might be surprised. The distinction seems to be well settled, that where the article sold is of any the least value, notice must be given of the defence; but if it is entirely worthless, then, under the general issue, the defendant will be entitled to a verdict, no notice being necessary.

A second point in the case is, whether on a breach of warranty in the sale of an article, where there is no fraud, the vendee can rescind the contract? There is authority for the position, that where a purchaser of an article, having had an opportunity of exercising his judgment upon it, had bought it with a warranty, that is of any particular quality or description, and actually accepted and received it into his possession, can afterwards, upon ascertaining that the warranty has been violated, of his own will, without the consent

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Wade v. Scott. of the vendor, return the article, and defeat the payment of the purchase money. Lord Eldon, in the case of *Curtis v. Hanney*, 3 Espinasse, 87, said, he took it to be clear law, that if a person purchases a horse which is warranted sound, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse, and bring an action on the warranty, in which he would have the right to recover the difference between the value of a sound horse, and one with such defects as existed at the time of warranty; or he might return the horse and bring an action to recover the full money paid. This dictum has been adopted by Starkie, in his work on evidence, part 4, page 645; and it is there said, that a vendee may, in such a case, rescind the contract altogether by returning the article, and refuse to pay the price, or recover it back if paid. Upon this the court of King's bench, in the case of *Strut v. Bloy*, 22, Com. Law R., remarks,—“That it is extremely difficult, if not impossible, to reconcile this doctrine with those cases, in which it has been held, that where the property in the specific chattel has passed to the vendee, and the price has been paid, he has no right upon the breach of the warranty, to return the article, and revest the property in the vendor, and recover the price as money paid on a consideration which has failed; but must sue upon the warranty, unless there has been a condition in the contract, authorising the return, or the vendor has received back the chattel, and has thereby consented to rescind the contract, or has been guilty of fraud, which destroys the contract altogether.” *Weston v. Dowmes*, 1 Doug.; *Towers v. Barret* 1 Term; *Payne v. Whale*, 7 East.; *Power v. Wells*, Cow. The court continues,—“If these cases are correctly decided, and we think they are—and they have certainly always been acted upon,—it is clear, that the purchaser cannot by his own act, unless in the excepted cases above mentioned, revest the property in the seller, and recover the price when paid, on the ground of the total failure of consideration; and it seems to follow that he cannot, by the same means, protect himself from the payment of the purchase money on the same ground.” See *Wynn v. Thornton*, 12 Peters.

This doctrine it will be seen, is predicated on the supposition, that the vendee has accepted the article sold, and that the contract is executed; it is not intended to be applied to cases of executory contracts, as where an article is ordered from a manufacturer, who stipulates it shall be of a certain quality, or that it shall answer a particular purpose; there, if the article is not such as was contracted for, the party may, after giving it a reasonable trial, return it, provided it be done in a reasonable time, and he does no act from which it may inferred he has accepted it. In these cases it cannot so much be said, that the vendee rescinds the contract, as that he refused to enter into it, because the vendor has failed to comply with his engagement.

From the instructions given by the court below, some stress seems to have been laid upon the fact, that Wade had an opportunity, and did examine the hands of the slave before the sale. There is no doubt, that when an article has been inspected before it is purchased, a warranty does not extend to defects which are obvious to the senses. But skill and judgment are often requisite to discover defects in articles offered for sale; and is he who following the dictates of prudence, refuses to rely on his examination, and requires warranty, at last in no better situation than he who purchases without one? It is clear that when an opportunity has been afforded for examining an article before sale, the vendee, if he does not require a warranty, is without redress, unless he can show a fraudulent concealment, or misrepresentation on the part of the vendor; but, although the vendee may have an opportunity of examining an article, yet if he requires a warranty, the vendor is answerable for any defect which is not obvious to the senses; 2 Kent Com., 485-6. The *Oneida Manufacturing Society v. Lawrence*, 4 Cow., 440. Whether the defect in the slave's hands was greater or not, than that excepted in the warranty was a question for the jury; and if they found it greater, it constituted a breach of the warranty, for which the party was answerable; and advantage could be taken of it in this

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Wade v. Scott

Plaintiff sold to defendant a slave with a written warranty that he was sound, "with the exception of a small defect in his hands." It appeared that the slave's hands were in such a condition as to render him almost worthless to the purchaser: Held, that this was such a misrepresentation of the extent and violence of the disease, as amounted to a breach of the warranty, and might be given in evidence, in an action for the stipulated price of the slave, in diminution of such price.

AUG. TERM, action, as has been previously shown; *Hanks v. McKee*, 1842, 2 Littel, 227.

Wade v. Scott.

It may be inferred from the instructions given by the court below, that considerable importance was attached to the circumstance, that Wade was apprised of the defect in the slave's hands at the date of the warranty. When a written warranty is made by the vendor, and that warranty is general, or contains a specific exception, with what propriety can evidence be introduced, to show that the vendee was aware of the unsoundness of the article, or of other defects than those excepted, or that the defect excepted was greater than represented to be? Here is a written warranty; its sense and effect are to be ascertained by itself, if evidence of the knowledge of any unsoundness on the part of the vendee is admitted, it must be on the hypothesis, that if the fact is established, then the vendor's responsibility is restricted according to the knowledge of the vendee, without regard to the terms of the warranty; otherwise the evidence is irrelevant. Is it not against a plain principle of law to receive parol evidence, to vary, limit or extend the legal effect of the terms of a written instrument? This doctrine is sustained by the authority of *Shackelford v. Gorch*, 1, Bibb 583, where it is held, that in an action of covenant, evidence that the defendant knew the article sold, and covenanted to be sound, was unsound, is not admissible.

As to the point made relative to the defendant's right to begin and conclude the argument to the jury, it may be observed, that there is no doubt of the right of the defendant to begin, when the *onus probandi* lies upon him, notwithstanding the technical form of the pleadings; 1 Starkie, 184. But this is a matter depending on the practice and discretion of the circuit courts. In an argument to a jury, the reply may or may not have had an influence on the verdict. If the verdict is such a one as could not otherwise have been rendered on the law and the evidence of the case, the circuit court would not grant a new trial, although the right to conclude had been denied to him who held the affirmative, and against whom

The right of counsel to commence or conclude an argument to a jury, depends on the practice and discretion of the circuit courts, and such practice and discretion will not be revised or controlled by the supreme court.

the verdict was rendered, nor would this court reverse ^{AUG. TERM,} a judgment for such a cause. The circuit courts are ^{1842.} enabled to exercise their discretion in such matters more ^{Wade v. Scott.} wisely than this court, which has not the means of ascertaining the influence the opening and conclusion of an argument may have had on the jury. This court has gone considerable lengths in the exercise of the right to revise the discretion of the circuit courts. I am not disposed to go farther and multiply the causes for the exertion of this power.

Opinion, by Napton, Judge.

I concur in Judge Scott's opinion *generally*, and in reversing the judgment of the circuit court, believing that the question of *notice*, under the general issue, does not arise in this case, inasmuch as the defences were fully set forth by special pleas. I give no opinion on that point.

Judge Tompkins dissenting.

SINGLETON V. FORE.

In an action on a covenant, parol testimony of the knowledge and understanding of the parties at the time of entering into the covenant, is inadmissible to control the force and effect of the covenant.

Error to the Circuit Court of Lewis county.

U. WRIGHT *for Defendant.*

Opinion of the Court, delivered by Tompkins, Judge.

Fore, the defendant in error, brought his action of covenant against Singleton in the circuit court of Lewis county, charging that Singleton, by his certain bill of sale, dated 29th November, 1838, sealed, &c. in consideration of the sum of seven hundred dollars, did sell to the plaintiff three

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negroes, to wit, Charlotte, Naomia, and Lucy, and did warrant the said negroes to be sound and healthy, except that the said Charlotte had one eye out.

The breach assigned is, that the said Charlotte and Lucy were not sound and healthy, with the exception aforesaid, but that Lucy was unsound and diseased, and in consequence thereof died, and that Charlotte was frost bitten and thereby greatly injured.

The pleas filed were *non est factum*, and covenants not broken. On which pleas issues were made up. The jury found for the plaintiff, and judgment was accordingly given.

The evidence given in the cause shows that Lucy, a child aged three or four years, was sick when she was delivered, and that Charlotte was frost bitten, and that this was known to Fore, plaintiff below and defendant here.

The circuit court, on motion of the plaintiff instructed the jury, that whether the plaintiff, Fore, knew of the unsoundness of either Charlotte or Lucy before the contract or execution of the bill of sale by the defendant, Singleton, is unimportant and cannot constitute a defence in this case.

Also, that what the plaintiff gave the defendant for the slaves, has nothing to do with the question.

The defendant excepted to the giving of these instructions, and prayed counter instructions which were refused.

But the circuit court, on the motion of the defendant, instructed the jury that unless they believed from the evidence, that the negro girl Lucy, was diseased at the time of the sale of the said girl, and that she died of said disease, without neglect, misconduct or maltreatment of said plaintiff, or of any other person after said sale, they must find for the defendant.

It would indeed be perfectly useless for contracting parties to enter into written covenants, if oral testimony were to be admitted to prove that the written agreement were not intended to make the covenantor liable for every covenant set out in the writing obligatory. These negroes, it is proved, were sick at the time of the execution of the contract. Fore knew that Charlotte was frost bitten, and that Lucy was otherwise diseased. This he might have

known, and might also have believed that neither of them was seriously diseased, and that they would in a few days be in health.

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To know the extent and danger of any disease of the body not uncommonly requires skill, and not unfrequently more attentive observation than even a skillful physician can bestow in a few hours. Therefore, the necessity of a warranty of soundness. Witnesses produced on each side have testified very differently as to the apparent health of the negro Lucy; and both sides might, it seems from the statements of the physician examined, have testified correctly. For he says, that the nature of her disease is such as to deceive by false appearances of health. The present case demonstrates clearly and forcibly the propriety of adhering strictly to the rule of excluding oral testimony, offered with a view to control the covenant of these parties. But we are not without authority. See *Townsend v. Wild*, 8 Mass. Rep. 146. "Covenant broken on a deed of the defendant to the plaintiff for the consideration of \$1676, to convey part of a messuage, &c. with covenants of a lawful seizure, good right to sell, premises free of all incumbrances, &c. The plaintiff avers that the defendant was not lawfully seized, that the premises were not free of incumbrances, that Gilliam Taylor had recovered the premises in a suit against the plaintiff, and ejected him by a lawful title. The defendant pleads in bar, that Townsend, at the time of the conveyance, knew of the deed of defeasance under which Taylor recovered, and accepted the deed with an agreement, that the defendant should not be charged in the event of a recovery under that deed. This is traversed in the replication, and an issue taken thereon. Upon the trial of this issue, the defendant offered to prove the agreement averred in his plea in bar by parol testimony, which the judge ruled to be incompetent, and the parties proceeded to an inquiry of damages. The defendant moved for a new trial, for the judge's rejection of the parol testimony. In the support of the motion it was contended, that it was competent for the defendant to give parol evidence of the fact put in issue by the pleadings. In the nature of things no other evidence could be expected

In an action on a covenant, parol testimony of the knowledge and understanding of the parties at the time of entering into the covenant, is inadmissible to control the force and effect of the covenant.

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ed. If the plaintiff would take such a deed, with the knowledge of such a fact capable of proof, he ought not now to recover damages against the understanding of the parties at the time of executing it." This is a stronger case even than that now before this court; for the deed under which Taylor recovered in the cited case, conveyed full information of the incumbrance on the estate sold: whereas it was impossible for any person, and especially for one unskilled in the diseases to which man is subject, to tell with certainty what will be the result of the diseases with which these negroes were afflicted at the time of sale. But, said the supreme court of Massachusetts, "This was an attempt to control the effect of a written and sealed instrument by parole evidence, which is never permitted. Supposing this incumbrance known, it was still competent to the defendant to covenant with his grantee to save him harmless from its effects; and if such was not his intention, he should have excepted out of his general covenants."

Chitty on Contracts, says, "Parole testimony shall not be received even to superadd a term or clause to a written agreement; for this would, in effect, be to alter such agreements. Thus, if a written demise be silent as to ground rent, or a land tax, parole evidence is not admissible to show that the tenant agreed to pay it."

"Where the whole matter passes in parole, all that passes may sometimes be taken together as forming a parcel of the contract, though, not always; because matter talked of at the commencement of a bargain, may be excluded by the language used at its termination. But if the contract be in the end reduced to writing, nothing which is not found in the writing can be considered as a part of the contract."—Page 25.

Again, the same writer says, "Though a sale be 'with all faults,' the vendor is liable on an express warranty. Thus, where an advertisement for the sale of a ship, described her as 'a copper fastened vessel,' adding that the vessel was to be taken 'with all faults,' without allowance for any defects whatsoever, and it appeared that she was only partially copper fastened, it was held that the vendor was liable."

The instructions of the court were very correct.

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The jury were told, that if they believed that the girl Lucy died through any neglect of the plaintiff, they must find for the defendant. Some of the witnesses said, this girl, if in good health, was worth \$200. A witness for the defendant, who thought her to be in good health, thought her worth \$300.

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The jury found only \$275 damages for all the injury sustained by plaintiff, both on account of the unsoundness of Charlotte and of that of Lucy. The plaintiff in error then has no right to complain either of the instructions of the circuit court or of the measure of damages.

The judgment of the circuit court must, then, be affirmed.

(Napton, Judge, not present.)

ARTHUR & SNYDER v. PENDLETON, LONG, & RILEY.

Petition in debt.—Plea, that the plaintiffs were not the legal owners of the note, and issue thereon. Held: That it was not necessary for the plaintiffs to prove the partnership set out in the petition; it was admitted by the plea.

Error to the Lincoln Circuit Court.

C. WELLS, for Plaintiffs.

PORTER for Defendant.

Opinion of the Court, delivered by Scott, Judge.

Pendleton, Long and Riley sued Arthur and Snyder by petition in debt. The petition set out the names of the plaintiffs at length, and contained an averment that the note was executed to them by the name and description of Pendleton, Long, and Riley.

Petition in
debt.—Plea,
that the plain-
tiffs were not
the legal own-

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The parties went to trial on the issue that the plaintiffs were not the legal owners of the note. The plaintiffs had judgment.

Arthur & Snyder v. Pendleton, Long & Riley.

On the trial an affidavit taken under the act of the General Assembly of 13th February, 1839, was read to prove the partnership of the plaintiffs below. This was objected to, and is assigned for error. The issue did not require proof of the partnership, it was admitted by the pleadings, consequently need not have been proved. Whether the affidavit was formal, it is unnecessary to determine. There was no error in admitting it, as it was immaterial, and not calculated to mislead or prejudice the jury.

As to the objection, that there was an averment of a partnership in the petition, it may be answered, the late decisions of this court warrant the form adopted by the pleader in this instance.

Judgment affirmed.

PRATT V. STUART.

Upon a review of the evidence in this cause, the court held that the verdict of the jury was sanctioned by the evidence.

Error to the Circuit Court of Marion county.

Opinion of the Court, delivered by Tompkins, Judge.

Stuart sued Pratt in assumpsit. Pratt pleaded non-assumpsit and set-off. Judgment was given for Stuart on both pleas, the jury having found for him.

Pratt admitted himself to be indebted to the plaintiff in the amount of the finding of the jury, but, contended that he was entitled to a set-off, of as much or more for services performed for plaintiff as editor of a newspaper. He produced witnesses who proved that he was several

years editor of the plaintiff's paper, and they stated that AUG. TERM in their opinion his services were worth one hundred and 1842. fifty or two hundred dollars per year.

Pratt v. Stuart.

A witness, produced by the plaintiff below, defendant here, states that he advised Pratt, who was his brother-in-law, to undertake the duties of editor of said paper; that he engaged in those duties in the fall of 1833, and continued till January, 1836, when the witness and defendant purchased one half of the paper; that he thought the occupation would be advantageous to Pratt, by introducing him to public notice; that the profits of the paper were not more than sufficient to support the proprietor; that it was not agreed or understood that he was to have any compensation; that the proprietor could not afford to pay any thing; that while Pratt was editing the paper, he was practising law, acting as clerk for the receiver of public moneys and farming. The jury finding as above mentioned against the defendant on his plea of set-off, he moved for a new trial, because the finding was contrary to evidence, and because he had discovered new evidence.

This new evidence is, that sometime before Pratt and Wright, as aforesaid, purchased an interest in this newspaper, Stuart, the defendant, had offered to one Quintin Thornton about two hundred dollars a year to edit the same paper. The evidence was given to the jury without any instructions from the court, none being prayed for, and none being thought necessary by the court. The defendant, then, had no right to complain of the finding, as evidence was given from which the jury might well find against him on his plea of set-off; and it might well be that Stuart would be willing to pay Thornton, for editing the paper, two hundred dollars per year, rather than have Pratt for nothing; it being in evidence that Pratt was engaged in much other business, and paid very little attention to the duties of editor.

Upon a review of the evidence in this cause, the circuit court held that the verdict of the jury was sustained by the evidence.

Evidence, then, that Stuart offered Thornton two hundred dollars per year, is not necessarily evidence that Pratt

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deserved to have any compensation in money, having obtained all perhaps that he at first aspired to, that is, extensive acquaintance and character in society as a man of business habits.

The judgment of the circuit court will be affirmed.

RECTOR V. HUTCHISON, RECTOR AND BERNARD.

A court of equity will not make a decree according to the wishes of all the parties, when such decree would be contrary to the established rules and usages of such courts. Therefore, where the complainant, who was a *cestui que trust*, filed his bill against another *cestui que trust*, and the trustee, praying a decree for a conveyance of all the land to complainant, and concluded with a prayer for general relief, the court properly decreed a conveyance to the *cestui que trusts* jointly, although the defendants were willing that the conveyance should be made according to the prayer of the bill.

Appeal from the Circuit Court of Cooper county.

ADAMS for Appellant.

Opinion of the Court, delivered by Napton, Judge.

This was a bill in chancery, brought by the complainant to compel a conveyance to him of a tract of land in Cooper county.

The bill alleges, that the complainant and the defendant, Nimrod Rector, jointly purchased some twenty acres of land of the defendant Bernard, and that the title bond was made to Hutchison, in consequence of his becoming their security to Barnard for the payment of the purchase money.

The bill further states, that by consent of parties, the land was laid off into town lots, and the money arising from the sales was first applied to the payment of the purchase money (which was in that way entirely satisfied,)

and that other portions of the money had been applied by Hutchison to the exclusive benefit of Nimrod Rector, so that said Nimrod had received his share. It is further alleged that said Nimrod is now insolvent, that Hutchison has got or can get the legal title from Bernard, and the bill prays that the court decree a conveyance to the complainant. Bernard answers and admits the facts as stated in the bill; says he has made a conveyance to Hutchison, and disclaims any interest in the matter. Hutchison also admits the facts to be as stated, and that he is mere trustee, &c.

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Nimrod Rector also answers and admits he has received his share, and is willing the deed should be made according to the prayer of complainant's bill.

The court decreed a conveyance to Nimrod and Charles Rector, jointly, and from this decree the complainant appeals.

A court of equity will not make a decree according to the wishes of all the parties when such a decree would be contrary to the established rules and usages of such courts: therefore where the complainant, who was a *cestui que trust*, filed his bill against another *cestui que trust*, and the trustee praying a decree for a conveyance of all the land to the complainant: and concluded with a prayer for general relief. The court properly decreed a conveyance to the *cestui que trust* jointly, although the defendants were willing

The objection made to the decree of the circuit court is, that it is not in conformity to the prayer of the bill. The bill prayed for a conveyance to Charles Rector alone, and for such other and further relief as to the court should seem just. It is not perceived, on what grounds the court could have decreed the title to the complainant only, unless it be because all the parties, plaintiffs and defendants, were willing. The bill and answers clearly show that Hutchison was a trustee for both the Rectors, and a joint conveyance to both, would be in accordance with the usages of courts of equity. But if a conveyance to one *cestui que trust* only, was desired, and no other or further interposition of the court expected, then there was no equity in the bill. If Nimrod Rector received a larger portion of the proceeds of the sales, than he was entitled to, this might constitute a good claim against the said Nimrod for reimbursement, but as such disbursements were admitted to have been made by consent of all the parties, both Nimrod and Charles, it can constitute no equity against Hutchison for a conveyance of this land, to which they are jointly entitled. If this

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that the conveyance should be made according to the prayer of the bill.

indebtedness of Nimrod Rector to Charles Rector be admitted, and this indebtedness amounts in value to the land not yet conveyed, it is difficult to see what need there can be for the interposition of a court of chancery to effect a transfer from one to the other.

But the rights of third parties might in this way be affected. The court must make the conveyance in accordance with the equitable rights of the parties, and unadjusted debts between the *cestui que trusts* cannot be allowed to influence the conveyance of the land.

The court are of opinion that the decree was right, and it is accordingly affirmed.

ADMINISTRATORS OF BARTON V. RECTOR AND OTHERS.

1. The third section of the act concerning "Bonds and notes," (R. S. 1835, p. 105,) declaring that the nature of the defence of the obligor or maker, shall not be changed by assignment, but he may make the same defence against the bond or note, in the hands of the assignee, that he might have made against the assignor, was intended to embrace equitable as well as legal defences.
2. In chancery. B. purchased a lot of ground from R., paid part of the purchase money, and gave his notes for the residue; and R. at the same time, covenanted to make a deed of general warranty as soon as the payments were completed. At the time of the sale the lot was incumbered, but this was known to B., who was not, however, placed in possession. Subsequently the lot was sold to satisfy the incumbrances. R. became utterly insolvent, and assigned the notes to others, who obtained judgment at law against B. on the notes. The prayer of the bill was for a rescission of the contract—a perpetual injunction of the judgments—a cancellation of the notes, and a return of the purchase money paid. The circuit court dissolved the injunction and dismissed the bill. The supreme court reversed the decree of the circuit court and decreed according to the prayer of the bill.

Appeal from the Circuit Court of Cooper county

Todd for Appellants.

Adams for Appellees.

*Opinion of the Court, delivered by Napton, Judge.**

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This was a bill in chancery, brought by the administrators of David Barton, deceased, against Nimrod Rector, Charles Rector, Jamison Samuel & Co., John H. Gay & Co., and others.

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v.
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others.

The bill charges that Barton in his life time contracted in writing with the Rectors for a lot in the town of Boonville, by the terms of which agreement they were to convey to said Barton the said lot by "deed of general warranty in fee," so soon as Barton completed the payments of purchase money. The price of the lot was three thousand dollars, payable in three installments for each of which Barton gave separate notes bearing interest, &c.

The bill alleges that these notes were assigned to Samuel & Co., Gay & Co., and others, made parties defendants.

The bill further charges a payment of \$672.10, by Barton, on one of the notes, and that judgment at law had been obtained on the others.

It is further charged, that the lot was incumbered by two deeds of trust, at the time of the sale; that these incumbrances were never removed, and that the Rectors were insolvent or in very embarrassed circumstances at the time of the sale. It is also alleged, that these incumbrances were concealed from Barton.

The prayer of the bill is for a rescision of the contract, a perpetual injunction of the judgments at law, a cancellation of the notes unpaid, and a return of the \$672.10, which Barton had paid in his life time.

The answers of the Rectors admit all the material allegations of the bill in relation to the terms of the contract, and the existence of the incumbrances; but deny all fraud and concealment. Both the Rectors admit their inability to remove the incumbrances.

*Judge Tompkins, being of kin to one of the parties, did not sit in the cause.

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others.

The answers of the assignees of the notes, who are the remaining parties to the suit, deny all knowledge of the transaction and rely on being protected as bona fide purchasers without notice.

On the hearing of the cause, the complainants proved that under the deed of trust mentioned in the bill, a sale of the house and lot had been made to satisfy said liens; that at the time of the sale to Barton, the said Rectors were in embarrassed circumstances, and that neither of them discharged the liens, and further proved the payment by Barton of the \$672.10, charged in the bill.

The defendants proved, that at the time of the sale to Barton, he had actual notice of the incumbrances, and of their being on record, and also knowledge of the embarrassed condition of the Rectors, and was persuaded not to purchase, but that he avowed his confidence in their honesty and industry, and his belief that they would remove the incumbrances.

The injunction was dissolved, and the bill dismissed. From this decree an appeal is now taken to this court.

In examining this decree we will first examine whether the assignment of these notes by the Rectors has in anywise affected the legal or equitable rights of Barton. This inquiry is an important one, and in this case, necessarily a preliminary one, as a decision favorable to the assignees, on this point, would render unnecessary any further investigation of the rights of complainants against the assignee.

The statutes of other States in *pari materia*, and the adjudication of the courts upon such statutes, have been much relied upon at the bar, with a view to elucidate the meaning of our act of assembly concerning the assignment of bonds and notes. But our statute is so plain and explicit that human ingenuity would hardly torture its language into an ambiguity.

The third section declares that "the nature of the defence of the obligor or maker, shall not be changed by the assignment, but he may make the same defence against the bond or note, in the hands of the assignee, that he might have made against the assignor." The fifth section fur-

ther declares "that the assignee shall never obtain any greater title to, or interest in, any bond or note than the person had from whom he acquired it."

The defence spoken of in this third section, was clearly intended to embrace equitable as well as legal defences: for the court of appeals of Virginia, in *Norton v. Rone*, (2 Wash. R. 233,) so construed the act of the Virginia Assembly, which merely provided that the plaintiff should allow *all just discounts and offsets*, either against himself or his assignor before notice of assignment. A similar statute in Kentucky was similarly construed, and the act held to save all equitable defences, which the obligor had against the obligee, from being impaired or affected by the assignments. *Rawlins v. Timberlake*, 6 Monroe R. 234.

As to the distinction between equities existing at the time of the assignment and those arising afterwards, such distinction appears to be unfounded. The equity must of course exist at the time the note is made, and it is difficult, if not impossible, to conceive of any equity springing up after the completion of the contract. The equity, if any there be, is brought into existence simultaneously with the contract, though the circumstances which call it into action may arise after or before the assignment. The existence of these facts or circumstances has no bearing upon the assignment, and the equitable rights of the obligor are not affected by the assignment, though they may have been called into active operation by the happening of events subsequent thereto. The main question in the case will then be considered, as though the Rectors, who were the obligees in the notes, were the only parties defendants. The assignees stand in no better position than what the assignors themselves would occupy. Though they are bona fide purchasers without actual notice, the law of assignments operates to place them on their guard against any equitable defence which existed against their vendors.

The bill, answers, and exhibits, show the facts of this case to be simply these: Barton purchased of the Rectors a lot in Boonville for three thousand dollars, for

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The third section of the act concerning "Bonds and notes," (R. S. 1835, p. 105.) declaring that the nature of the defence of the obligor or maker, shall not be changed by assignment, but he may make the same defence against the bond or note, in the hands of the assignee, that he might have made against the assignor, was intended to embrace equitable as well as legal defences.

In chancery.
B. purchased
a lot of ground
from R., paid
part of the

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which he gave three several promissory notes. At the same time, the Rectors covenanted to make him a deed of general warranty in fee simple, so soon as the payments were completed. Barton paid a portion of the purchase money, and after his death his executors were sued upon the other notes, and judgment recovered. At the time of the sale, the lot was incumbered, but Barton knew of the incumbrance, and was aware of the embarrassed pecuniary condition of the Rectors; but anterior to the decree, the lot was sold and passed entirely out of the Rectors. Will a court of equity now throw the complainants upon their covenant, when it is apparent that no title can be made, and that no real satisfaction could be obtained by a suit at law.

I will, however, leave out of view, in this aspect of the case, the insolvency of the Rectors. Their entire inability to make a conveyance is conceded in their answers, and proved, if proof were necessary, by the testimony. They have covenanted to make a deed in fee simple, with general warranty, and such a covenant implies not merely their willingness to make a deed of this character, but their *ability* to make a deed which will carry an indefeasible title. *Judson v. Wap*, 11 John R. 524; *Clute v. Robinson*, 2 J. R. 614. Such a deed is, by their own admissions, clearly beyond their power.

A manifest distinction is to be traced through all the cases between executory contracts, and those which have been executed. In the latter class, where a deed has been made, and possession given, there must be an eviction at law under paramount title, before the court of chancery will interfere, and the vendor selling in good faith, is not responsible for his title beyond his covenants. *Bumpass v. Pattner*, 1 John C. R. 218; *Gouverneur v. Elmendorf*, 5 ib. 84; *Abbot v. Allen*, 5 ib. 523. Whether an outstanding incumbrance, shown by the record, be equivalent to an eviction, is not well settled; but the knowledge of such an incumbrance by the vendee at the time he accepted his deed, would seem to preclude him from asking the interposition of a court of equity.

purchase money, and gave his notes for the residue: and R. at the same time, covenanted to make a deed of general warranty, as soon as the payments were completed. At the time of the sale the lot was incumbered, but this was known to B., who was not, however, placed in possession. Subsequently the lot was sold to satisfy the incumbrances. R. became utterly insolvent, and assigned the notes to others, who obtained judgments at law against B. on the notes. The prayer of the bill was for a rescission of the contract—a perpetual injunction of the judgments—a cancellation of the notes, and a return of the purchase money paid. The circuit court dissolved the injunction, and dis-

But the case now before the court is the case of an executory contract; no deed has been made or accepted, and no possession given. There having been no possession, there could of course be no eviction. But the complainants equity rests upon the total failure of consideration, not a mere defective title, but an entire inability on the part of the vendor to make any title whatever.

In the case of *Rawlins v. Timberlake*, (6 Mo. R. 234,) where the contract was executed, a deed of general warranty made and accepted, and possession of the land taken by the vendee, the court refused to rescind the contract, merely because adversary claims were set up, of which the purchaser had notice at the time of the sale.—There had been no eviction, and that the court regarded as essential to warrant its interference. Yet even in that case, it appearing that a part of the land conveyed with warranty was lost, the court enjoined so much of the purchase money as was equivalent to the value of the land lost, upon the ground of the insolvency of the warrantor. The language of Judge Bibb, when treating of this branch of the case, is applicable here. "If," says he, "equity could interfere in such a case, by reason of the insolvency of the warrantor, to arrest the payment of the purchase money, or any part of it, it would only be by clear evidence of eviction or undoubted defect of title, so as to show the covenant of warranty broken, and by stopping payment of so much of the purchase money as was equal to the damages incurred by the breach." This was accordingly done, and the complainant, as to the loss established, was not thrown upon his covenants, but obtained the equitable interference of the court.

In this case, there is a total failure of consideration, and a court of equity would not turn the parties round to a suit at law, even were it obvious that such suit would be of any avail.

The admissions of the Rectors, their failure to remove the incumbrances, and the proofs taken in the cause, render it exceedingly probable that a suit upon their covenant would be fruitless. But admitting that it would not

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bill. The su-
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reversed the
decree of the
circuit court,
and decreed
according to
the prayer of
the bill.

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others.

be so, their entire inability to make any title is a sufficient ground for arresting the payment of the purchase money. And their assignees, as we have seen, stand in no better predicament than themselves.

It is therefore ordered, that the decree of the circuit court be reversed, and this court proceeding to make such decree as the circuit court should have made, do hereby order, adjudge, and decree, that the contract aforesaid be recinded, the judgments at law be perpetually enjoined, and that Nimrod and Charles Rector refund to the administrators of David Barton, deceased, the sum of \$672.10 with interest.

THOMPSON & SOWERS V. ALLSMAN.

Although work may not be done according to the contract, and there is no waiver of the contract; yet, if the work is afterwards accepted, the person performing the work is entitled to recover its value.

Error to the Monroe Circuit Court.

Opinion of the Court, delivered by Scott, Judge.

This was an action of assumpsit brought by Allsman against the plaintiffs in error, on a written contract to build two boats of a particular description. The declaration contained counts on the special agreement, and a common count for work and labor, &c. On the trial, Allsman obtained a verdict and judgment.

The testimony in support of the special counts was contradictory; and evidence was given, conducing to show that the plaintiffs in error accepted the boats after they were built.

The court instructed the jury, that if they believed from the evidence, that the plaintiffs built the boats, and they were afterwards accepted by the defendants, they must find for the plaintiffs the value of the boats.

It is clear, that if the boats were not built according to contract, the plaintiffs in error were under no obligation to accept them, unless they had done some act, from which it might be inferred they waived a compliance with the contract, or unless, they with a full knowledge acquiesced in a deviation from it. If, however, the boats were not built according to contract, and there was no waiver of a compliance with it; yet if they were afterwards accepted, the builder was entitled to recover their value.

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Sowers
v.
Allsman.

Although work may not be done according to the contract, and there is no waiver of the contract; yet if the work is afterwards accepted, the person performing the work is entitled to recover its value.

Admitting the special contract was not complied with, yet under the common count, the defendant in error was entitled to a verdict. There was no error in the instruction of the court, and the jury whose exclusive province it was to ascertain the weight of the evidence, and determine the credibility of the witnesses, having found a verdict for the defendant in error, there is nothing preserved in the bill of exceptions which would warrant us in disturbing it.

Judgment affirmed.

HART V. RECTOR.

A sheriff selling land under execution, must describe the land with such certainty, that it may be known what specific land is offered for sale, and where it lies. A sheriff's deed describing the land sold, as "three and one-half eighths of the Boonville tract, situated in Cooper county, on the south side of the Missouri River," is not void for uncertainty in the description. (Scott, Judge, dissenting.)

Error to the Circuit Court of Cooper county.

LEONARD for Plaintiff.

ADAMS & HAYDEN for Defendant.

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Opinion of the Court, delivered by Napton, Judge.

Hart v. Rec-
tor.

This was an action of ejectment for the north-west fractional quarter of section 35, township 49, of range 17.

On the trial, the plaintiff gave in evidence a patent from the United States, dated 19th November, 1822, to Henry Carroll, Robert Wallace, and himself. Thereupon, the defendant, for the purpose of showing title out of the plaintiff, gave in evidence a judgment of the circuit court for Cooper county, in favor of Th. A. Smith against George Tonnall and the plaintiff Hart; a fi. fa. execution thereon, of the 10th October, 1828, with the sheriff's return thereon, and the sheriff's deed of the 17th February, 1829, conveying the said land so levied on and sold, to one William M. Adams.

The plaintiff then gave in evidence two judgments of the Cooper circuit court against Hart; one in favor of Gideon James, of the 26th January, 1821; and the other in favor of Noah Nichols, of the 21st May, 1821. Fi. fa. executions thereon, of the 9th August, 1823, with the sheriff's returns and writs of *venditioni exponas* of the 2nd July, 1824. The return to the writ of *venditioni exponas*, certified that the sheriff had advertised and sold the property described in the writ; and that it sold for \$41, 12¹/₂, and was signed by the sheriff. Afterwards, at the Oct. term, 1836, leave was given to the sheriff to amend the return made in 1824; by which amended return, it appeared that the sheriff sold "all Hart's interest in the Boonville tract, being three and one-half eighths," to Gersham Compton.

The plaintiff then offered in evidence, a deed of the 27th October, 1836, for this land, made by the sheriff of Cooper county to Gersham Compton, made in pursuance of the order of the circuit court of Cooper county. The description of the land conveyed in this deed, is "three and one-half eighths of the Boonville tract, situate in Cooper county, on the south side of the Missouri river." This deed was objected to, and the court ex-

cluded it. The plaintiff then offered the same deed, with proof that the expression, "*Boonville tract*," was at the times of the levy, advertisement, and sale, and making of the deed, well known in the county of Cooper and neighborhood, to mean the north-west fractional quarter of section thirty-five, township 49, range 17; and that this tract of land, at the time of the levy, had acquired the appellation of "the Boonville tract," and was then and afterwards, down to the time of the conveyance, generally known by that appellation. To this proof defendant objected, and it was excluded by the court.

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The plaintiff saved his exceptions to the action of the circuit court: suffered a non-suit, and afterwards moved to set it aside, but the motion was overruled by the court. The case is brought here by writ of error. Before considering the material question which has been raised and argued, it is proper to dispose of a preliminary objection which has been urged against the plaintiff in error. The record does not show, that the plaintiff proposed to derive any title from Compton, (the deed to whom was rejected,) and therefore the judgment of the circuit court may be sustained, upon the ground that it is not apparent, but that the deed was rejected for impertinence and irrelevancy. In many cases it must be admitted, liberal presumptions have been indulged by this court, in favor of the action of the circuit court, and especially in all questions concerning new trials, and those in which a discretionary power has been exercised by those courts. The same rule might perhaps, *stricti juris*, bind the plaintiff in error here. But the presumption would be strained too far, in my opinion, to let it prevail in a case like this, when the testimony offered to remove the objections, must be sufficient to satisfy this court of the real character of those objections. Without attempting then to lay down any general rule which shall govern the future action of this court, we pass by the objections, and proceed to consider the case on its merits.

The question is, whether the sheriff's deed to Compton was void on its face for uncertainty in the descrip-

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tion of the land conveyed. There can be no doubt, that this deed would not have been void, if it had been an ordinary conveyance of the vendor's own interest; but sales by process of law, must be governed by very different rules.

A sheriff selling land under execution, must describe the land with such certainty that it may be known what specific land is offered for sale and where it lies. A sheriff's deed describing the land sold, as "three and one half eighths of the Boonville tract, situate in Cooper county, on the south side of the Missouri river," is not void for uncertainty in the description.

A sheriff has no right to sell land under execution, except such as he can describe with sufficient certainty, so that purchasers may know what specific land is put up at auction, and where it lies. It is not necessary that the exact quantity of acres should be ascertained; nor would it be necessary to set it out by metes and bounds; but a reasonable degree of certainty is requisite, that the property of debtors may not be swept away under loose and indefinite executions and advertisements.

In the case of *Simonds v. Cothin*, (2 Caines R. 65) the sheriff's deed purported to convey "*all that farm or tract of land in Pompey, in the tenure and occupation of the defendant.*" This was held void for uncertainty, and the court declared that a more definite description of the situation, and amount of the land, and of the quantity of the defendant's interest therein ought to have been stated: at the same time agreeing, that the sale need not be precise as to quantity of acres, and as to the metes and bounds. "The thing sold," says Judge Kent, "must, in all cases, be specified with so much precision, as from the description it can be reduced to certainty."

In *Jackson v. DeLancy*, (13 John. R. 532) the sheriff's deed was for certain specified lands, and "*also all the other lands, tenements and hereditaments, whereof the said William, Earl of Sterling, was seized within the county of Ulster,*" and under this clause of the deed, the premises in dispute were claimed. The court held the description to be entirely too indefinite.

These cases are sufficient to show the distinction recognized by the courts between judicial sales and mere private sales, and the grounds for such distinction are apparent and just. Yet, even in judicial sales and deeds made under them, it has not been held that any particular form of description is requisite; or that any thing

more is necessary than to describe the land with such precision, that it may be reduced to certainty.

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The descriptive words used in the deed from the sheriff to Compton, when explained by the testimony offered in the circuit court, do not seem to come within the mischief sought to be guarded against by the principles settled in the New York cases.

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Had the land been described by its section, township and range, it would indisputably have been good. The testimony offered by the plaintiff, established that the tract of land was as well known by the name given it in the deed, as it was by the name of its sectional subdivision. The specific land is pointed out, and the county in which it lies. It is difficult to perceive how purchasers could have been deceived, or how any mischief could have resulted from such description.

This court is therefore of opinion that the deed from the sheriff to Compton should have been admitted.

Several points have been raised in this cause, which we think are not now properly before the court: whether this deed to Compton be effectual to pass any title, as against the purchaser under Adams? Whether the deed has relation back to the time of the sale? Whether there was any sufficient note or memorandum of this sale, to save it from the operation of the statute of frauds, are very important questions, which will hereafter arise in the cause, but which cannot be decided on the present imperfect state of facts. This court cannot anticipate all the facts which may be developed hereafter, or which might have been developed, had the plaintiff gone through with his title. As the matter stands now, it would be unsafe to venture any opinion; and this court will, therefore, reverse the judgment of the circuit court, and remand the cause for further proceedings.

Scott, Judge, dissenting.

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AND OTHERS.

The State,
to the use of
Warburton &
King, v.
Woods and
others.

1. A sheriff will not be liable for an escape, under the fifty second section of the act concerning executions, (R. C. 1835, p. 260,) if, at the time of the escape, he is deviating from the line of his duty, at the request of the plaintiff, or his agent, as taking the defendant to some particular place for the purpose of obtaining security for part of the debt, even if the prisoner escape by the negligence of the sheriff.
2. If there is any evidence given from which the jury might infer a particular fact, its sufficiency to establish such fact must be determined by the jury.

Appeal from the Circuit Court of Morgan county.

HAYDEN for Appellant.

WILSON AND MILLER for Appellees.

*Opinion of the Court, delivered by Tompkins, Judge.**

This was an action of debt, brought by the State, to the use of Warburton and King against Woods, and others, his securities on his official bond as sheriff of that county. Judgment was given in the circuit court against the State, suing to the use of, &c., and to reverse that judgment this appeal is prosecuted.

The breach assigned is, that Warburton and King having delivered to said Woods, sheriff as aforesaid, an execution issued by the clerk of the circuit court of Boone county, on a judgment obtained in that court against one John G. Brewster, by said Warburton and King, and Woods having taken said Brewster on said execution, suffered him to escape. On the trial of the cause, the delivery of the execution to Woods being proved, the witness who delivered it, further proved on the part of the plaintiffs, that he delivered the execution to Woods at his own house, and told him that he wanted it immediately attended to; that he wished to be present when Brewster was taken; that in a few hours he and Woods

*Judge Napton did not sit during the trial of this cause.

set out to the mouth of the Gravois, where it was expected to find Brewster, and there found him; that before they found Brewster, the witness had told Woods that he learned from Warburton and King that Brewster was not to be trusted, and that he wished to be present when Brewster was taken, in order to make some arrangement in case he was not able to pay, and that he was agent of the plaintiffs in the execution; that he several times told the sheriff, Woods, that he had no confidence in Brewster, and that Brewster, if he discovered their business, would make his escape; that having found Brewster at the mouth of the Gravois, Woods served the execution on him, and asked him for property of several kinds, and that Brewster denied having any; Woods then took him, and told him to consider himself his prisoner; that Brewster having learned from the witness that he was the agent of the plaintiffs, desired to speak with him. Witness and Brewster walked off some distance together down a hill, and out of sight of the sheriff, and Brewster made some indefinite propositions about the debt, saying something about giving security for half of it, that the witness and Brewster then returned to a grocery where they had left the sheriff, and there found him. Woods mentioned that he must go over the Gravois to Miningport, to collect money on a merchant's license. The witness said he would go along to see the site of Miningport, of which he had heard much talk. They started to go, and the sheriff asked Brewster if he could set them over. Brewster got into the canoe, walked to the stern and sat down. Woods got in next, and sat near the middle—witness got in last, and sat near the bow. Brewster paddled across the Gravois, the river being higher than usual. When they reached the opposite shore of the Gravois the witness got out first, Woods next, and then they walked along near each other in the direction of the store house, the witness foremost. When they had walked some thirty or forty yards, witness, hearing a noise, turned and saw Brewster in the water shoving the canoe out into the stream, and told Woods. Woods turned,

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and advancing a few steps towards the canoe, called to Brewster, asking if he intended to serve him so. Brewster answered, swearing that he would not go to jail.— Brewster continued to paddle briskly down the Gravois, and as he was going, called to the witness, requesting him to stay in the neighborhood that evening, and that he would see him. Whilst Brewster was making his escape down the river, the sheriff called to some men near the grocery, telling them that he summoned them to take that man. Brewster made his escape into the Osage river, and went down it. The witness denied that he assented to the escape of Brewster, or that he was either directed or requested to take charge of the prisoner. This witness's name is Vaughn.

The defendant then introduced a witness named Hicks, who stated that he was at the grocery on the day that Vaughn and Woods came, when Brewster was arrested on the execution; that he heard Brewster ask Vaughn if he was agent of Warburton and King, and desired a conversation with him. On being informed that he was agent, Hicks states, that Vaughn and Brewster walked off under the hill, about twenty paces, or there about; the witness heard Brewster and Vaughn in conversation on the subject of the debt for which the execution was issued, and believes he heard Brewster tell Vaughn that he thought he could give one Seth Howard as security for the debt, if Vaughn would take him; and after Brewster and Vaughn had remained absent at the above mentioned place a few minutes in conversation, they returned back into the presence of the sheriff at the grocery, and the witness then heard Brewster, Vaughn, and Woods in conversation with each other upon the subject of the claim, and that it was the understanding that if Brewster could and would give said Howard as security for the debt, that it would be satisfactory to Vaughn, and it was agreed on all hands that they, Brewster, Woods, and Vaughn, would go and see Howard, to know whether he would go security; that as Woods had business in Miningport, and Vaughn wished to see it, they all agreed

to go over. After it was agreed by Brewster, Woods, and Vaughn, as above stated, to see Howard, Woods called over to Fisher, to come from Miningport to the grocery; Woods had declined going over, and afterwards went over.

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This witness, on cross examination, stated that he did not hear either Vaughn direct the sheriff to discharge Brewster from custody, or the sheriff direct Vaughn to assist in guarding Brewster; that when it was determined to go over to Miningport, there were several canoes at the bank, one of which only could be used, the others being filled with rock, and having no oars or paddles belonging to them. They entered the canoe and got out after crossing, according to this witness, as the other states, except that after Vaughn and Woods "had stepped a few paces on the bank, a distance, he thinks, not more than four or five paces, that Brewster followed on after until he got to the bow of the canoe, when he put one foot upon the bank, and made a sudden and violent shove, and run the canoe back into the creek, and then he fell to work with his paddle, and paddled his canoe into the middle of the channel of the Osage river, and made his escape down the river."

About the time Brewster was pushing off from the shore, the witness further stated, Woods called over to the witness and others on the opposite side of the creek to arrest Brewster, but they had no vessel in which to pursue him.

The defendants also introduced another witness named Gist, who testified to the same facts that Hicks did.

This being all the evidence, the plaintiff asked eight instructions of the court. The court gave all except the second, third, and eighth. The amount of the five given, so far as is material to be here noticed, is that the sheriff, after he arrested Brewster was bound to keep him with due diligence, and not to permit him to go at large, and that the witness, unless commanded by the sheriff to guard Brewster, was under no obligation to do it. The instructions refused were:

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2. That in this case there is evidence that the sheriff permitted the prisoner, Brewster, to make his escape from his custody.

3. That there is no evidence in the cause conducing to show that Woods, after he took Brewster into custody, used any reasonable means within his power to keep Brewster safely in his custody.

8. That in this case the defendants have given no evidence going to show that he, Woods, was not guilty of a negligent escape in permitting Brewster to escape.

The court, on the motion of the defendant, gave these instructions :

1. If they believed from the testimony, that Vaughn had as much authority over the execution as the plaintiffs in the execution would have had, had they been personally present, and that the escape grew out of the interference of Vaughn with the prisoner in order to secure the debt, then they must find for the defendants.

2. That if they believe from the evidence, that Vaughn had power to release Brewster from the execution, and that the prisoner was carried out of the course to the jail, at his instance, to make an arrangement to secure the debt, and that the escape took place in consequence of this arrangement, then they must find for the defendants.

Verdict being found for the defendants, the plaintiff moved the court for a new trial, because, First, the court refused to give the plaintiff's second, third, and eighth instructions, and because the court gave the instructions asked by the defendant.

Third, the verdict was against law, &c.

The correctness of the conduct of the circuit court, in refusing to give the instructions asked by the plaintiff, is to be tested by the correctness of its conduct in giving the two instructions asked by the defendants. Vaughn, the witness on the part of of the plaintiff, had testified that he told the sheriff that Brewster was not to be trusted, and that he wished to be present when Brewster was taken, in order to make some arrangement in case he was unable to pay,

and that he was agent of the plaintiffs in the execution. He also testified that he had a conversation with Brewster apart from the sheriff after Brewster was taken, and that Brewster made some indefinite proposition about the debt, saying something about giving security for half of it, and leaves us to draw our own conclusion as to his acceptance of these propositions. Hardin Hicks, a witness examined on the part of the defendant, states that he was not far distant and heard this conversation between Brewster and Vaughn, and he stated that he thought he heard Brewster tell Vaughn that he thought he could give one Seth Howard as security for the debt, if Vaughn would take him; that in a short time Brewster and Vaughn returned to the sheriff, and it was agreed that Woods, Brewster and Vaughn would go and see Howard, to know whether he would go security. Another witness corroborates Hicks' evidence. Whether Howard lived in Miningport, and it was part of their business in that place to see him, does not appear from the testimony, nor in my opinion is it material.

The jury were told by the circuit court that if they believed Vaughn was in this affair agent for the plaintiffs, and that the escape grew out of his interference with the prisoner in order to secure the debt, they must find for the defendants. They could not but have believed the two witnesses who testified that Vaughn had agreed to go to see Seth Howard; for Vaughn himself did not say any thing that could induce a different belief. By his interference, the risk then of escape was increased. Whether, then, Seth Howard lived at Miningport, and they were going to that place to see him, or they were to go to that place first, and after their return, were to see Howard, is immaterial, inasmuch as Vaughn agreed to the whole arrangement.

The risk, then, being increased with Vaughn's consent, the jury had an undoubted right to find that the escape grew out of the interference of Vaughn with the prisoner to secure the debt. It was the right of the sheriff to take the prisoner to jail immediately after the arrest; and moreover, it was a duty he owed equally to himself and to his securities, and if the plaintiffs in the execution, by their agent, were not content to wait, to make their arrangement to se-

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A sheriff will not be liable for an escape, under the 52d section of the act concerning executions (R. C. 1835, p. 260,) if, at the time of the escape, he is deviating from the line of his duty, at the request of the plaintiff, or his agent, as taking the defendant to some particular place, for the purpose of obtaining security for part of the debt, even if the prisoner escape by the negligence of the sheriff.

If there is any evidence given from which

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the jury might
infer a parti-
cular fact, its
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establish such
fact must be
determined by
the jury.

cure their debt, until the prisoner was lodged in jail, they certainly ought not to be indulged in their humor at the risk and cost of the defendants in this action.

The instructions asked by the plaintiffs, called on the court to usurp the province of the jury, since there was evidence given from which the jury might have inferred, and must have inferred, that the escape of the prisoner was the consequence of the interference of Vaughn, the plaintiff's agent. The evidence of Vaughn differed from that of the other witnesses as to the degree of diligence used by the sheriff. He states that Brewster did not shove the canoe from the shore till he and Woods had walked some thirty or forty yards from the canoe. The other witnesses stated, that they had not advanced more than four or five paces from the bank of the creek, when Brewster, advancing to the bow of the canoe, put one foot on the bank, and making a sudden and violent *shove* pushed the canoe into the middle of the creek: and this is the most probable account, for why should he wait so long? It required but an instant to get into the water out of their reach, and the sooner it was done, the less risk he ran of being prevented. It is in vain that Vaughn says he was not commanded to watch the prisoner, &c. It is in evidence, that he assented to this request of the prisoner, and, indeed, desired the prisoner to be taken to Seth Howard's, to try and find security for the debt; and the jury finding for the defendants, on the instructions given, must have believed that the escape took place in consequence of the interference of the plaintiff's agent. Had the sheriff been left to himself, he would have been answerable on his bond for the escape of Brewster; but if the plaintiffs, through their agent, Vaughn, will ask of him to perform a duty not belonging to his office as sheriff, and in deviating from the line of his duty prescribed by law, (which was to take the prisoner directly to jail,) the prisoner escape either by accident or negligence, the sheriff cannot be made answerable on his official bond. For it then becomes a matter of special agreement between the parties. The law makes no provision for such cases, and the sheriff's securities could not have contemplated any liability in such a case.

The Judgment of the circuit court ought in my opinion to be affirmed, and judge Scott concurring, it is affirmed.

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v.
Wood and
Oliver.

McDANIEL & OUSLY v. WOOD & OLIVER.

1. After the dissolution of a partnership, one partner cannot draw, accept, or endorse bills to bind his co-partner.
2. A transfer of a bill or note, payable to order, can only be made by the person who is legally interested, and if the person to whom it is assigned, when he took the paper, knew that the person making the transfer had no right to make it, such transfer is inoperative.

Error to the Circuit Court of Monroe county.

GLOVER for Plaintiffs.

Opinion of the Court, delivered by Napton, Judge.

The plaintiffs below, Wood and Oliver, sued the defendants upon a note, executed by them to Pickett and Hawkins, for \$1656.05, and assigned by endorsement to the plaintiffs.

From the bill of exceptions, it seems that George G. Hawkins and John C. Pickett composed the firm of Pickett & Hawkins; that the note sued on was given by McDaniel & Ously to Pickett & Hawkins in consideration of a stock of goods sold by them to McDaniel & Ously; that Pickett & Hawkins endorsed said note in blank, and delivered it to Shropshire & Ously, in payment of debt: that Shropshire, after the dissolution of the firm of Shropshire & Ously, delivered the said note to Th. L. Anderson, and directed him to collect the same, and apply it to the debts against Shropshire and Ously; that Ously was not present when this was done, and never assented to it, but on the contrary, informed Anderson, that he denied the power of Shropshire to dispose of the note. Anderson knew, when he received the note, that the firm of Shropshire & Ously had been dissolved: but with no other authority than what has been stated

AUG. TERM, 1842. above, he filled up the blank endorsement to Wood & Oliver, the plaintiffs, who were creditors of the said firm of Shropshire & Ously.

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The circuit court held, that on this state of facts, the plaintiffs could recover, and a verdict, under the instructions of the court, was accordingly found by the jury, and judgment went for plaintiffs.

The doctrine is well settled, that after the dissolution of a partnership, one partner cannot draw, accept, or endorse bills, so as to bind his copartner. Chitty on Bills, 61. In this case, the endorsement was made by an agent of J. P. Shropshire, upon authority derived from him only, and was therefore only binding on him. The agent, at the time he filled up the blank endorsement, by the authority of Shropshire, was aware of the dissolution of the partnership, and of the entire absence of any authority from Ously.

A transfer of a bill or note, payable to order, can only be made by the person who is legally interested, and if the person to whom it is assigned, when he took the paper, knew that the person making the transfer had no right to make it, such transfer is inoperative. Chitty on Bills, 221. This court is therefore of opinion that the instructions of the circuit court were erroneous. Judgment reversed, and cause remanded.

A transfer of a bill or note, payable to order, can only be made by the person who is legally interested, and if the person to whom it is assigned, when he took the paper, knew that the person making the transfer had no right to make it, such transfer is inoperative.

GALE V. DAVIS.

A person who enters upon the land of the United States, and keeps possession without any valid claim or title, is a trespasser, and may be sued in trespass quare clausum fregit, by a purchaser from the United States, for an injury to the freehold, after the purchase.

Error to the Circuit Court of Scotland county.

GLOVER for Plaintiff.

*Opinion of the Court, delivered by Tompkins, Judge.**

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Gale v. Davis.

This was a suit commenced by Davis against Gale before a justice of the peace. Judgment was rendered for Gale, and Davis appealed to the circuit court, where Davis obtained a judgment, to reverse which Gale has sued out this writ of error.

On the trial of this cause, it was proved that Davis, the plaintiff in the circuit court and the defendant in error, purchased from the United States the east half of the south east quarter of section No. 12, in township No. 64, and range No. 12, west; and that, afterwards, Gale had carried away rails from said land. The defendant, Gale, gave evidence that he had occupied this land before it was divided into sections by the United States, and made a field thereon, and inclosed it with rails, for which this suit was brought. That Gale expected to hold a pre-emption there; that he did hold one quarter section, (on which the greater part of said field lay,) by purchase from the United States; that Gale kept the entire possession of the field so made and inclosed, from the time he made the improvement till he carried away the rails in question. The plaintiff, Davis, moved the circuit court to instruct the jury, that if they believed that Davis entered the land in the declaration mentioned, with the receiver of the proper land office, and that Gale afterwards entered upon the said land and took and carried away the said rails without Davis' consent, and converted them to his own use, they must find for the plaintiff, Davis, altho' they may believe from the evidence that Gale made said fence before Davis' entry with the receiver.

The circuit court gave the instruction above asked by the plaintiff, and refused a counter instruction asked by the defendant, Gale.

The counsel for the plaintiff in error seems to rest his case upon the circumstance that Gale was (in his language) "a bona fide settler on the land entered by Davis,"

*Napton, Judge, absent from the bench.

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and adds, "will he be precluded?" and refers to 6 Mo. Rep. 588.

Gale v. Davis.

A person who enters upon the land of the United States, and keeps possession, without any valid claim or title, is a trespasser, and may be sued in trespass quare clausum fregit, by a purchaser from the United States, for an injury to the freehold after the purchase.

What he means by a "bona fide settler," I freely admit that I do not understand. The case referred to in 6 Mo. Rep., is Turley v. Tucker, in which it was decided that Turley, who had cut down a number of trees on the land of the United States, intending them for his own use, could not maintain an action against Tucker, who had carried them away to his own mill and appropriated them.

In 6 Bacon, p. 566, title Trespass, it is said, that the person in whom the freehold of land is, cannot maintain an action of trespass quare clausum fregit, for an injury done to the land whilst it was in the possession of another." The American authorities referred to are, 1 Johnson, 511, Campbell v. Arnold; and 3 Johnson, 468, Tobey v. Webster. The first case, cited in Bacon, which is also cited for the plaintiff in error, shows "that a lessor cannot maintain trespass quare clausum fregit against a stranger for cutting down and carrying away trees while there is a tenant in possession." The court in that case say, "A general property, in the case of real estate, is not, as in the case of personal property, sufficient to support this action. Admitting the fee of the land to be in the plaintiff, his remedy for an injury to the freehold must be either against his tenant, or against the defendant, in a different form of action. To the same purpose is the case of Tobey v. Webster, and the case of Con v. Goes, cited in Van Brenet v. Schurk, 11 Johnson, 384, and the case of Hickam v. Freeman, 12 Johnson, 183; both of which last cases are relied on by the counsel for the plaintiff in error. If the plaintiff in error can show himself in like situation with the defendant in the above cited cases, then they will be authority for him.

If at the time he carried away these rails, there were any person holding the land, either under the United States before the sale to Davis, or under Davis, since the sale, then the action would not lie. But no such thing is pretended. It is in evidence that he obtained a right of pre-

emption on an adjoining quarter section, and instead of being content with that, he lays claim on that account to the adjoining land.

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Gale v. Davis.

It is admitted that a patent from the United States gives a right of possession. The case of *Green v. Litch*, relied on by the plaintiff in error, like the others, is any thing else than a help to him. At page 246, 8 Cranch, Judge Story says, in speaking of entries on lands, "The same is the result of conveyances deriving their effect under the statute of uses; for there, without actual entry or livery of seizen, the bargainer has a complete seizen in deed." Our statute, indeed, gives to the holder of the receiver's receipt the same right to sue that he could have with a patent in his hand. See second section of the act regulating ejectment, p. 134 of the Digest. But the whole mistake arises in considering this trespasser under the character of a tenant under the United States. By his trespass, he gained no right against the United States, and therefore can derive none from them against Davis, their vendee. Unless, therefore, he can show an authority to hold this land under the United States, previous to the sale by them to Davis, he does not hold by such claim as will deprive Davis of his right to sue in trespass.

If we regard the morality of the thing, it is highly presumptuous in the plaintiff in error to set up such a defence. It is in evidence, that he settled on an adjoining quarter section, and obtained on it a pre-emption; now, not content with that, he claims the possession of the adjoining half-quarter section which another had purchased, and the consideration and whole merit of his claim to the possession is, that he had been a trespasser thereon.

The judgment of the circuit court ought in my opinion to be affirmed.

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PYE V. RUTTER.

- Pye v. Rutter.**
1. A party in declaring on an agreement may set it out according to its legal effect, and is not bound to use the very words of the instrument; but if he undertakes to set out the contract according to its legal effect, he must do so in direct terms, and not by way of innuendo.
 2. Where a party undertakes to convey land upon the performance of a particular act—as the payment of money—it is not necessary to aver, in a declaration on the covenant, a demand for a deed.

Error to the Marion Circuit Court.

GLOVER AND CAMPBELL for Plaintiff.

*Opinion of the Court, delivered by Scott, Judge.**

This was an action of debt brought on a bond with a condition underwritten, by which it was agreed, that if the plaintiff would, on a given day, pay to the defendant the sum of forty-five dollars, he, the defendant, would execute and deliver to the said plaintiff, a good and sufficient deed of conveyance in fee simple for two lots in the town of Baltimore, in the county of Marion; otherwise he would pay the penalty, which was one hundred and thirty dollars. Two breaches were assigned in the declaration. In the first count the plaintiff, after setting out the condition as above, avers by way of innuendo, that the defendant, by the words of the said condition, meant he would make a good fee simple title for said lots, and avers a performance of all things on his part to be done according to the tenor of the condition; and concludes by assigning as a breach, that the defendant, although often requested to do so, has not made to the plaintiff a good title in fee simple to the said lots.

The second count, after setting out the condition of the bond, avers, by way of innuendo, that the defendant meant by the words of the said condition, that he was able to make to the plaintiff a good title in fee simple for said lots, and would do so; and avers a performance of all things on his part, to be done according to the tenor of the condition of the said bond; and alleges that at the

*Napton, Judge, absent from the bench.

time of his performance, there was a valid and subsisting mortgage on said lots for the amount of \$200,00; and assigned as a breach, that the defendant was not able to make the plaintiff a good title in fee simple to said lots. There was a special demurrer to these counts, which was sustained by the court below; and the plaintiff has brought his case here by writ of error.

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Pyer v. Rutler.

We cannot doubt but that the court did right in sustaining the demurrer of the defendant. The mode adopted to obtain the opinion of the court, as to the meaning of the condition of the bond, was novel and unprecedented, at least we have not been enabled after some research, to find a precedent for such a mode of declaring on a contract. Nor do we consider, that we would subvert the science of pleading, by permitting a party to obtain the opinion of a court as to the meaning of a contract, set out in the manner the plaintiff has employed on the present occasion. If the meaning of the agreement was, as the plaintiff contends, then it should have been so directly averred without any innuendo; and the defendant by craving oyer and demurring, would have brought the question properly before the court, or it might have been determined on the trial of an issue on the plea of *non est factum*, by objecting to the introduction of the instrument on the ground of a variance.

The ability of the defendant to make a title in fee simple, could only have been necessary in the event of a plea of performance of the condition by the defendant; and that fact might have been replied to such a plea, if the meaning of the agreement was, that he was able to make a title in fee simple.

The party seems to have mistaken the office and nature of an innuendo. It is employed to explain facts for the jury, and is never used to expound a contract for the court. It is explanatory of facts already expressed, and may show the application of those which have been expressed; but it can never add to or vary the sense of the previous words. It is commonly, if not exclusively, used in declarations and indictments for libels, and in declara-

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tions for slander. The party in declaring on an agreement, may set it out according to its legal effect: he is not bound to use the very words of the instrument: it is sufficient if he employs those of the same legal import;

Pye v. Rutler.

A party in declaring on an agreement, may set it out according to its legal effect, and is not bound to use the very words of the instrument. But if he undertakes to set out the contract according to its legal effect, he must do so in direct terms, and not by way of innuendo.

but if he does set out the contract according to its legal effect, it must be done directly, and not by way of innuendo.

As to the question, whether a special request was necessary to be averred by the plaintiff in his declaration, we are of the opinion that no demand for a deed was necessary. This is not an agreement to convey upon request, or to convey generally, without specifying any time, but it is an undertaking to convey upon the performance of a particular act, the payment of a bond, of which one party has as much knowledge as the other. The defendant cannot object, that having assigned the bond for the money, he can have no notice of its payment. He must take notice of the payment at his peril;

Where a party undertakes to convey land upon the performance of a particular act—as the payment of money—it is not necessary to aver, in a declaration on the covenant, a demand for a deed.

1, Mo. R., 186.

Judgment affirmed.

BUTTERWORTH V. RATCLIFF.

Petition in debt. The date of the note was indistinct; it being uncertain whether the date was "2" or "4." The circuit court, upon inspection of the note, decided it was "4," as set forth in the petition. Held: That whether the date was "2," or "4," was a matter of inspection, and the circuit court having satisfied itself upon that point, the supreme court would not undertake to pronounce the decision erroneous, particularly as only a *fac simile* of the note was preserved in the bill of exceptions.

Appeal from the Circuit Court of Marion county.

WRIGHT for Appellant.

Opinion of the Court, delivered by Napton, Judge.

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This was an action by petition in debt. The note is set forth in the petition, and the date is "March 2nd. 1840." The note given in evidence, it appears from the bill of exceptions, was dated "March 4th;" but the hand writing being somewhat indistinct, the court, upon inspection, refused to exclude it for variance, and found a verdict for the plaintiff.

The defendant, before the objection to the note was disposed of, offered to show by testimony, that the true date of the note was "March 4th." It appears from the bill of exceptions taken in this case, that the date of the note was not very clearly written; and it became a question whether the figure 4 or 2 was really designed by the penman. The court, however, upon inspection, was satisfied, and refused to hear evidence upon the matter. *A fac simile* of the note is preserved in the bill of exceptions.

Whether the figure used was a 2 or a 4, was a matter of inspection; and the circuit court having satisfied itself, it is difficult to see how this court can pronounce that opinion erroneous. The circuit judge had the original before him, and this court has not the same means of arriving at a correct conclusion. The judgment of that court will be affirmed.

a fac simile of the note was preserved in the bill of exceptions.

Butterworth
v.
Ratcliff.

Petition in debt. The date of the note was indistinct, it being uncertain whether the date was "2" or "4." The circuit court, upon inspection of the note, decided it was "4," as set forth in the petition.

Held: that whether the date was "2" or "4," was a matter of inspection; and the circuit court having satisfied itself upon that point, the supreme court would not undertake to pronounce the decision erroneous—particularly as only

JONES V. LUCK.

1. Ejectment. Plaintiff claimed under one L. by deed dated Feb. 28th, 1834. Defendant claimed as purchaser at sheriff's sale, by virtue of an execution issued on a transcript of a judgment against L., filed in the clerk's office on the same day, i. e. Feb. 28th, 1834. It appeared that the deed was filed one hour and twenty minutes after the transcript was filed. Held: That the purchaser at sheriff's sale must prevail, as the lien attached from the time of the filing of the transcript.
2. In order to acquire a lien on the real estate of the defendant, it is only necessary to file in the clerk's office a transcript of the judgment, and not a complete copy of the justice's docket relating to the cause.

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Appeal from the Circuit Court of Pike county.

Jones v. Luck.

STUART AND MILLER for Appellant.

WELLS for Appellee.

*Opinion of the Court, delivered by Tompkins, Judge.**

Luck brought his action of ejectment against Jones, in the circuit court of Pike county, where judgment being given for him, Jones appealed to this court.

On the trial of the cause the plaintiff gave in evidence: 1st. A patent from the United States, dated 20th. June, 1832. 2nd. A deed from Montgomery and wife to Joseph Basey, dated October 13th, 1832. 3rd. A deed from said Basey and wife to Edward McQuire, dated March 18th, 1833. 4th. A deed from said McQuire, and Joseph Basey and wife, to Larkin Luck, dated 2nd. September, 1833. 5th. A deed from Larkin P. Luck to Diggs Luck, dated February 28th, 1834.

The defendant admitted himself to be in the possession of the premises as charged in the declaration.

• The defendant gave in evidence a deed from the sheriff of Pike county to himself, showing that Jones was purchaser of the land in question at a sale, by authority of an execution issued by the clerk of the circuit court of Pike, on a judgment obtained by one Thomas Bruce against Larkin P. Luck, the above named vendor of this land, to Diggs Luck, the plaintiff in this suit in the circuit court, appellee here. To give the clerk of the circuit court authority to issue an execution against this land, the plaintiff in the execution, the said Bruce, filed on the 28th day of February, 1834, at forty minutes after two of the clock, P. M., in that clerk's office, a transcript of the judgment of the justice on which the execution was issued. The deed of Larkin P. Luck to Diggs Luck appellee, as above mentioned, was filed on the 28th February, 1834, but at 4 o'clock, P. M., one

*Napton, Judge, absent from the bench.

hour and twenty minutes later than the transcript of the judgment had been filed. AUG TERM,
1842.

The defendant also gave in evidence a transcript of all the proceedings of the justice, in the suit in which the said judgment was rendered. Jones v. Luck.

On the execution issued by the justice was this endorsement:—"Received of Jesse Shepherd the body of Larkin P. Luck as a prison debtor," dated February 28th, 1834, and purporting to be signed by the jailor.

The plaintiff objected to the reading of this evidence; and the circuit court sustaining the objection, the defendant excepted to the opinion of the circuit court.

It is contended by the appellant, that the court committed error in excluding the evidence offered by him.

For the appellee it is said, "This case presents several points preliminary to the examination of the errors complained of.

1st. The bill of exceptions does not state that it contains all the evidence offered in the cause. In such case, the court cannot see the relevancy of the evidence offered.

2nd. There was no motion for a new trial.

It is the practice of this court to reverse a judgment of the circuit court for improperly refusing a new trial, or when the evidence is very strong against the finding of the jury; and always in such cases it is expected that the bill of exceptions should show all the evidence given on the trial, and also that a new trial was prayed. But I cannot conceive why, in this case, the appellant should have been required to show that this was all the evidence given. It is very evident to me, that this evidence which the court rejected was not only relevant, but very material: and it certainly could not have availed him in any wise to have obtained a new trial, and have all his evidence rejected a second time. No appellate court could, on a revisal of the circuit court's judgment, allow the appellant the costs of a new trial, so heedlessly and indeed wantonly demanded. The preliminary points then, appear to me to have nothing in them.

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The main points then are:

Jones v. Luck. 1st. The copy of the judgment of the justice, filed with the clerk of the circuit court, was defective in being a copy of the judgment only, and not a complete copy of the justice's docket. To this purpose several authorities are cited.

Ejectment.
Plaintiff

claimed under one L. By deed dated February 28th 1834. Defendant claimed as purchaser at sheriff's sale, by virtue of an execution, issued on a transcript of a judgment against L., filed in the clerk's office on the same day, i. e. February 28th 1834. It appeared that the deed was filed one hour and twenty minutes after the transcript was filed. Held: that the purchaser at sheriff's sale must prevail, as the lien attached from the time of the filing of the transcript.

The 18th section of the 6th article of the act to establish justices' courts, p. 364 of the digest, declared that "every justice, on demand of any person in whose favor he shall have rendered judgment for more than ten dollars, exclusive of costs, shall give to such person a certified transcript of such judgment; and the clerk of the circuit court of the same county in which the judgment was rendered, shall, upon the production of such transcript, file the same in his office, and forthwith enter such judgment in the docket of the circuit court judgments and decrees, and shall note therein the time of filing such transcript." The copy of the judgment then, is all that the plaintiff is required to file in such case; and the 19th section of said act provides, that every such judgment, from the time of such filing of the transcript thereof, shall have the same lien on the real estate of the defendant in the county, as a judgment of the circuit court of the same county, shall be equally under the control of the circuit court; and shall be carried into execution in the same manner and with like effect as the judgments of such circuit court, &c.

In order to acquire a lien on the real estate of the defendant, it is only necessary to file in the clerk's office a transcript of the judgment, and not a complete copy of the justice's docket, relating to the cause.

The lien then of this judgment, supersedes that of the deed of Larkin P. Luck to the appellee Diggs Luck, being first filed for record.

2nd. It is contended by the appellee, that the execution issued by the justice, shows that the defendant was arrested and committed to jail on the day judgment was rendered; that no discharge from imprisonment is shown; and that this is prior to the writ under which the land is sold.

Therefore the plaintiff insists that this is an extinguishment of the debt, and that the sale is therefore void. He cites and relies on 6 Durnford and East. 525, Clark

v. Clernort & English ; 4 Barrow, 2482, Vigeri v. Aldrich ; and 8 Johnson, 366, Jackson v. Bartlett, where it is said, that if the plaintiff in the execution voluntarily discharges the defendant after he is taken on execution, that it is a satisfaction of the judgment. Now this indorsement of the jailor above noticed, made on the execution, is no evidence certainly that the plaintiff in that execution, assented that Larkin P. Luck should be discharged. The indorsement on the execution is this: "Received of Jesse Shepherd the body of Larkin P. Luck, as a prison debtor," signed by the jailor. By what authority the jailor makes indorsements on executions we are not told. Nor does that indorsement tell who Jesse Shepherd is, from whom the body of Larkin P. Luck, the prison debtor, is received. We may certainly, by looking at the constable's return, see that he signs his name J. Shepherd, and therefore believe that this jailor received the body of the prison debtor from him ; but this is not technical accuracy : and those persons who seek to sustain judgments, such as this, where all the defendant's evidence has been rejected, and this rejection attempted to be justified in the face of the statute, speaking in plain terms, against the appellee, should see that they themselves at least, conform to the rules of law.

This appellee, Diggs Luck, after a judgment is rendered against his vendor, Larkin P. Luck, takes a deed from said Larkin, and runs a race with the plaintiff in that judgment to get his deed filed for record, before the plaintiff in that judgment could get a transcript of his judgment filed. He is too slow. The transcript of the judgment is filed one hour and twenty minutes too soon for him ; and the modest man contends that a complete transcript of the justice's proceedings should have been filed, for the very good reason probably, that an awkward justice of the peace might have been detained long enough making out this transcript for him to have filed his deed first.

The language of the statute is plain and imperative. It commands the justice to give the plaintiff a certified transcript of the judgment ; and it also commands the

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v.
Roger.

clerk of the circuit court to file such transcript in his office, and declares it a lien, &c. on land. Such being the language of the law, it seems not a little strange that the appellee cites authorities to prove that by the word "judgment," something else than judgment was intended. Neither the reporter of the cited cases, nor the judges that decided them, ever probably read our statute, and their decisions have no application to the subject.

Because then, the circuit court rejected the evidence offered by the defendant, its judgment is reversed and the cause will be remanded.

WILLIAMS V. RORER.

1. A. sold to B. a mare, delivered possession, and gave an absolute bill of sale. B. at the same time, executed, on a separate paper, a defeasance giving to A. the right to redeem the mare, on the payment of a certain sum on a certain day. Held, to be a mortgage, and not a pledge, and that the title of B. became absolute *at law*, on the failure of A. to redeem within the prescribed time.
2. A tender made in bank bills is good, unless it is objected to for the reason that it is so made.

Error to the Howard Circuit Court.

CLARK AND WRIGHT for Plaintiff.

DAVIS for Defendant.

*Opinion of the Court, delivered by Scott, Judge.**

Williams commenced his action against Rorer, in a justice's court, for fifty dollars, part of the supposed value of a mare which Williams alleged he had pawned to Rorer. It seems Williams executed and delivered to Rorer

*Napton, Judge, absent from the bench.

an absolute bill of sale for the mare. The instrument was under seal. The mare was delivered at the date of the bill of sale. Rorer delivered to Williams an instrument, of which the following is a copy.

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"This is to certify that I am willing that Benjamin Williams may redeem the Uncas mare, by refunding me one hundred dollars, any time between this and the first day of June, and if not, she is my property in full. Given under my hand this third day of March, 1840.

GERMAN A. RORER."

It was proved that Rorer sold the mare to one of his neighbors, but on condition, that if Williams made application to redeem her before the first day of June, she should be returned to Rorer, to enable him to comply with his undertaking to Williams. Williams tendered the money to Rorer on the first day of June, and was told by him that he was one day too late. The tender was in bank notes. There was contradictory testimony as to the value of the mare, some of the witnesses believing she was worth one hundred dollars, the price paid for her, and some of them thinking she was worth more. Rorer obtained judgment, and Williams sued out his writ of error.

It was contended in the circuit court by Rorer, that the transaction amounted to a mortgage, or to a conditional sale, and consequently that the plaintiff was not entitled to recover, not having tendered the money within the time agreed on by the parties. Of this opinion was the court, and instructed the jury accordingly.

On the other hand it was insisted, that the agreement between the parties constituted a pledge, and that consequently the plaintiff had a right to redeem the mare after the lapse of the time appointed by the parties for her redemption, and that even if such was not the law respecting the redemption of a pledge, yet Rorer having sold the mare before the time for redemption had passed, Williams was released from all obligation to tender the debt. The court refused instructions embodying this view of the subject.

A. sold to B. a mare, delivered possession, and gave an absolute bill of sale. B. at the same time, executed, on a separate paper, a defeasance, giving to A. the right to redeem the mare, on the

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Held, to be a
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failure of A.
to redeem
within the
prescribed
time.

There is a distinction between a mortgage and a pledge, which is well ascertained both in the English and American law. A mortgage of goods differs from a pledge in this, that the former is a conveyance of title upon condition, and it becomes an absolute interest at law, if not repaid by the prescribed time ; and it may be valid without delivery. A pledge, or pawn, is a deposit of goods, with a right of redemption, on prescribed conditions. Delivery accompanies a pledge, and is essential to its existence. Only a special property passes to the pledgee; while the general property remains with the pledger.—*Cortleyou v. Lansing*, 2 *Cain's Cases*.

The bill of sale from Williams to Rorer is absolute on its face, and conveys the general property to him ; there is nothing in it or the subsequent agreement, which shows that Williams intended merely a delivery of the mare to be kept for the security of a debt. If the general property passed, then the transaction is a mortgage, and not a pledge. In the case of *Deslodge and Rosier v. Ranger*, 7 vol. Mo. R., we held an agreement very similar to the present, to be a mortgage. There is no doubt of the correctness of the position assumed by counsel for the plaintiff in error, that in the case of a pledge, the party has a right to redeem after the appointed time ; and if he will make a tender of the debt, he may, both at law and in equity, recover the value of the pledge, although the time of the redemption agreed on by the parties has elapsed. But in the case of a mortgage, if there is a given time for redemption, the title of the mortgagee becomes absolute at law, if the mortgagor fails or neglects to redeem, or offer to do so, at the stipulated time, and he is driven to equity for relief. Story on Bailment.

A tender made
in bank bills
is good, unless
it is objected
to for the rea-
son that it is
so made.

If, then, this transaction was a mortgage, the plaintiff, in order to maintain his action at law, should have shown a payment within the time, or an offer to do so, or some sufficient reason for his failure, caused by the conduct of the mortgagee. The offer to pay the debt on the first day of June, was too late ; it was not within the time prescribed ; and although the tender was made in bank bills,

yet such a tender is always good, unless it is objected to for the reason that it is made in bank paper.

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But it is said by the plaintiff, that he was released from the obligation of making a tender of the debt, because before the time for redemption had elapsed, the defendant sold the mortgaged property. It is a general principle that the law does not require a party to do a nugatory act. And if an individual has disqualified himself to comply with his contract, a demand would be a needless formality. It has been held, that if a pawnee of chattels disposes of them without notice to the pawnor, no tender of the debt is necessary before instituting the suit, because he has incapacitated himself to perform his contract to return the pledge. *Cortleyou v. Lansing*, 2 *Cain's Cases*. The disposition of the mare made by Rorer was not such a one as prevented him from complying with his undertaking to Williams, had he returned, or offered to return, the money. The witness to whom the mare was sold states expressly that she was to be returned to Rorer in the event of an application by Williams to redeem within the prescribed time. It cannot then be said that Rorer had incapacitated himself to comply with his contract, nor does it appear, but that, if the money had been tendered in time, the mare would have been restored to Williams. Williams, then, having let the time of redemption pass, the title of Rorer to the mare became absolute at law. A tender after the day, was insufficient to divest him of the property, and his only recourse was to a court of equity, one of whose maxims is, "once a mortgage, always a mortgage."

Judgment affirmed.

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LOCKRIDGE AND PILCHER V. WILSON.

Lockridge and
Pilcher.
v.
Wilson.

1. In an action by partners to recover a partnership demand, it will be incumbent on the plaintiffs to prove that they were partners at the time of the contract, and the common reputation of the neighborhood is insufficient to prove such partnership.
2. Partnerships are usually proved by the oral testimony of clerks, or other agents or persons who know that the alleged partners have actually carried on business in partnership.

Error to the Circuit Court of Howard county.

CLARK for Plaintiff.

DAVIS for Defendant.

Opinion of the Court, delivered by Tompkins, Judge.

Lockridge and Pilcher commenced their action against Wilson, before a justice of the peace, where they obtained a judgment, from which Wilson appealed to the circuit court.

In that court, Lockridge and Pilcher suffered a non-suit, and moved to set it aside. Their motion to set aside this non-suit was overruled, and they now seek to reverse the judgment of the circuit court, for error committed in overruling their motion to set aside this non-suit.

In an action by partners to recover a partnership demand, it will be incumbent on the plaintiffs to prove that they were partners at the time of the contract, and the common reputation of the neighborhood is insufficient to prove such partnership.

The evidence in the bill of exceptions shows that the demand of the plaintiffs in the suit was for beef sold by one of them, Pilcher, to Wilson, the defendant.

The plaintiffs then offered to prove that it was generally understood in the neighborhood that the plaintiffs were in partnership in the butchering business at the time the beef in question was sold. This evidence being objected to by the defendant, was rejected by the court, the plaintiffs excepted to this decision of the court.

The plaintiffs then offered to prove that both of the plaintiffs had acknowledged that they were in partnership in the butchering business during the date of the

account in this cause; (that is, I suppose, during the time they were selling this beef to Wilson;) but that such acknowledgment was never made in the presence of the defendant. The defendant objecting to this evidence also, the court refused to permit it to go to the jury.

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Wilson.

This decision of the court was also excepted to, and assigned for error.

The evidence of partnership usually consists in the oral testimony of clerks and other agents who know that the alleged partners have actually carried on business in partnership. It is unnecessary, even in criminal cases, to produce any deed or other agreement, by which the copartnership had been constituted. 2 S. Arkie, 583. This is the kind of proof plaintiffs must produce to show their right to sue as partners. The plaintiffs have produced none such. But where suit is brought against any persons as partners, their own admissions of partnership is good evidence for the plaintiffs that they, the defendant's, are so, because admissions against our interest are good evidence against us. So in the case of King v. Ham, 4 Mo. Rep., cited by the plaintiffs, the declarations of Ham, plaintiff in the circuit court, were given in evidence by King, to prove a partnership betwixt them, and to defeat consequently Ham's right of action against King. Common reputation may suffice to raise against defendants a presumption of partnership, which they may rebut, either in whole or in part, by more positive proof, as in *McPherson v. Rathbone*, 11 Wendell; in *Whitney v. Sterling*, 14 Johnson, 215, and in *Gowan v. Jackson*, where the court say, prima facie evidence of a partnership being given, "it is thrown on the defendant to show the beginning of the partnership, if it began subsequent to the drawing of the bill" about which the suit was instituted.

Partnerships are usually proved by the oral testimony of clerks, or other agents or persons, who know that the alleged partners have actually carried on business in partnership.

Now if Lockridge and Pilcher could have proved that Wilson had admitted, since this account began to be raised, that they were partners, or even before, that would have been very good evidence for them against

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v.
Wilson.

him. But though their own admissions against their interest may be evidence against them, it would offend against every rule of evidence to receive their own admissions, or rather declaration in their own behalf in evidence for them. Nor can they establish their own partnership so as to entitle them to sue as partners by common reputation, because they have it in their power to procure better evidence: they might have had written articles; they might have called witnesses to the act of forming a partnership, whether such act were in writing or merely verbal; or, as in Starkie, above quoted by the plainiffs themselves, they might prove it by their clerks. If then they have neglected to provide the means to prove a partnership, they must abide the consequences of their own negligence; for the rules of evidence must not be relaxed in favor of the negligence of suitors. It is sufficient for them that they are indulged in proving by oral testimony the existence of a partnership which is evidenced by written articles. It is in their power to secure for their own safety the most authentic proofs of their partnership. The world at large can obtain no other evidence of the existence of such partnership than what they chose to give out.

The circuit court, then, committed no error in refusing to set aside the non-suit. Its judgment is therefore affirmed.

MULDROW V. CALDWELL, Administrator.

AUG. TERM.
1842.Muldraw
v.
Caldwell.

1. It is a general rule, that in declaring on written instruments it is sufficient to set out their legal effect, and in ascertaining their legal effect reference will be had to the presumed intention of the parties. Therefore, where M. together with others, executed a note payable to himself or order, and afterwards endorsed the note to C, it was held to be the promissory note of M. and that C. might declare in debt against M. alone, as the maker of the note, and that it was not necessary to aver any consideration in the declaration.
2. The sixth section of the statute concerning "Bonds and notes," makes notes drawn in the manner therein prescribed, negotiable as inland bills of exchange; it does not avoid those not drawn as therein directed, but only takes away their negotiability as inland bills of exchange, that is, the holder of such notes will take them subject to any defence the maker might have had against them, and without any right to damages in the event of their being dishonored.

Error to the Marion Circuit Court.

GLOVER AND CAMPBELL for Plaintiff.

*Opinion of the Court, delivered by Scott, Judge.**

Calwell brought an action of debt against Wm. Muldraw, the plaintiff in error, on the following instrument:

\$7,500.

AUGUST 4, 1837.

One hundred and twenty days after date we, or either of us, promise to pay to William Muldraw, or order, seven thousand five hundred dollars. for value received, without defalcation.

JOHN MCKEE,
WM. WRIGHT,
URIAL WRIGHT.
REDICK MCKEE.
WM. MULDROW.

On the said note was the following endorsement:

"Pay the within to James Caldwell, sen.

"WM. MULDROW."

*Napton, Judge, absent from the bench.

AUG. TERM.
1842.

Muldrow
v.
Caldwell.

The declaration was against Muldrow alone, and alleged that the note was payable to his order.

The general issue was pleaded, and judgment was rendered for Caldwell.

On the trial it was objected, that there was a variance between the note sued on and that in the declaration, inasmuch as the note is made payable to Wm. Muldrow, or order, and the declaration alleges that the note was payable to the order of Muldrow only.

It is a general rule, that in declaring on written instruments it is sufficient to set out their legal effect, and in ascertaining their legal effect reference will be had to the presumed intention of the parties. Therefore, where M. together with others, executed a note payable to himself or order, and afterwards endorsed the note to C., it was held to be the promissory note of M. and that C. might declare in debt against M. alone as the maker of the note, and that it was not necessary to aver any consideration in the declaration.

It is a general rule, that in declaring on instruments it is sufficient to set out their legal effect. What was the legal effect of the instrument declared on? When there is any ambiguity or uncertainty in the terms of the instrument, it may, especially against the party negotiating or making it, be so construed as to give effect to it according to the presumed intention of the parties; and, therefore, where a note was drawn in these terms: "Borrowed of J. S. fifty dollars, which I promise never to pay," it was held the word "never" might be rejected. In the case of *Edis v. Bury*, 6 B. and C., 433, the instrument sued upon was drawn by John Bury, and made payable to himself or order, and endorsed by him; the name of Grutherot was written across it. The instrument was declared on as a promissory note, and the holder recovered. Lord Tenten, in delivering the opinion of the court, said, this is an instrument at least of a very ambiguous character. In form it is a promissory note, for it contains, in terms, a promise to pay the sum mentioned in it; but then, in the corner of it there is the name of Grutherot, and it appears that his name is also written across the instrument. In that respect, although it does not in terms contain a request to Grutherot to pay, yet it resembles a bill of exchange. It is an instrument, therefore, of an ambiguous nature, the law ought to allow the holder at his option to treat it either as a promissory note or bill of exchange. In *Major v. Hammond*, cited by Bayley, judge, in *Harvey v. Kay*, 9 B. and C., which was argued before the twelve judges, all of them were of opinion that an instrument might be a bill of exchange, though the drawer and drawee

were the same person; and *Roach v. Ostler*, reported in *Man and Key*, 120, is authority to show that such an instrument may be treated as a promissory note, and declared on accordingly.

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The case of *Allen, executor, v. Shadburne, executor*, 1 Dana, has been cited and relied on to show that the instrument sued on in the case now under consideration, may be regarded void as to the defendant, and binding on the other parties to it. In that case it was held by the majority of the court, that a suit may be maintained against a single obligor, upon a writing purporting to be the joint bond of the plaintiff and another, and in effect, the sole obligation of the other. If this case be law, we do not see its application to the one now before us. The principles which determine the effect and validity of sealed instruments vary from those which govern bills of exchange and promissory notes.

It is said, that the note is not negotiable within the statute concerning bonds and promissory notes, and therefore the holder cannot maintain an action on it. The statute makes notes drawn in the manner therein prescribed, negotiable as inland bills of exchange: it does not avoid those not drawn as directed, but only takes away their negotiability as inland bills of exchange; that is, the holder of such notes will take them subject to any defence the maker might have had against them, and without any right to damages in the event of their being dishonored. The notes will stand as they did at common law. Is there any principle of the common law which avoids such an instrument as is declared on in the record now before us? In the case of *Fenner v. Meors*, 2 Black. R. 1269, the obligor, by an indorsement on a repondentia bond, promised to pay the same to such assignee as the obligee should appoint, it was held, the assignee might maintain assumpsit against the obligor. Here the promise was not made to any person in particular, but generally, to whomsoever the obligee should appoint. In *Weston v. Barker*, 12 John R., securities were placed in the hands of Barker to collect and dispose of for certain

The 6th sec. of the statute concerning "Bonds and notes" makes notes drawn in the manner therein prescribed, negotiable as inland bills of exchange; it does not avoid those not drawn as therein directed, but only takes away their negotiability as inland bills of exchange; that is, the holder of such notes will take them subject to any defence the maker might have had against them, any without any right to damages in the event of their being dishonored.

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purposes, and to hold the balance subject to order. The owners of the securities drew on Barker in favor of a third person, and it was held, that the party in whose favor the order was drawn, might maintain an action against Barker. That Barker, by accepting the trust had promised to pay to whomsoever the depositors should direct, and an action might be maintained against him. In good sense and sound principle there is no difference whether the plaintiff was originally named, or afterwards designated according to the terms of the defendant's undertaking. The promise was to hold the balance subject to the order of the depositors. So soon as such order was given, the promise attached and enured to the benefit of the person to whom it was given. It was a well settled rule of the common law, that choses in action are not assignable, and therefore when a person entitled to money due from another, assigns over his interest in it to a third person, the mere act of assignment does not entitle the assignee to maintain an action for it, but if there be an assent or promise on the part of the debtor or holder of the money, the action for money had and received has been holden to lie.

The reason why actions of debt could not at common law be maintained on promissory notes, was, because being unsealed, they imported no consideration, and it was necessary in every such action to aver and prove a consideration. Chitty on Bills, 550. By the statute of 1807, which with modifications has prevailed here ever since, it was provided, that whenever any suit shall be commenced, founded on any writing, whether the same be under seal or not, the court before whom the same is depending, shall receive the same in evidence of the debt or duty for which it is given, unless the defendant shall in the manner therein pointed out, deny the execution of such writing by plea, supported by affidavit. The decisions of the superior court of the territory were uniform, that it was not necessary for the plaintiff in his declaration to state the consideration for which the note declared on was given, and such has been the practice under

this statute to this day. Rector and Conway v. Honore, AUG. TERM,
1 Mo. R. 204. 1842.

If we are correct in holding the instrument declared on in the case now before the court, a promissory note, and we think the authorities amply sustain us in that position, then it was not necessary to aver any consideration in the declaration, and the plaintiff is entitled to recover.

Long v.
Overton and
Pickett.

Judgment affirmed.

CALLOWAY V. MUNN.

Appeal from the Lewis Circuit Court.

Opinion of the Court, delivered by Scott, Judge.

The question involved in this case, was determined at the present term of the court in the case of Jamison v. Yates.

The judgment of the circuit court is reversed and the cause remanded.

LONG V. OVERTON & PICKETT.

The first section of the sixth article of the act concerning "Practice at Law," leaves the power of amendment somewhat to the discretion of the circuit court, and this discretionary power will not be controlled by the supreme court, unless some good will result therefrom. Therefore, where the circuit court refused to permit the plaintiff, on the trial, to amend his declaration in a material respect, the supreme court refused to interfere.

Error to the Circuit Court of Marion County.

WRIGHT for Plaintiff.

AUG. TERM,
1842.

Opinion of the Court, delivered by Napton, Judge.

Long v. Over-
ton & Pickett.

The 1st sec.
of the 6th ar-
ticle of the
act concerning
"Practice at
Law," leaves
the power of
amendment
somewhat to
the discretion
of the circuit
court; and this
discretionary
power will not
be controlled
by the su-
preme court,
unless some
good will re-
sult therefrom.
Therefore,
when the cir-
cuit court re-
fused to per-
mit the plain-
tiff on the trial
to amend his
declaration in
a material res-
pect, the su-
preme court
refused to in-
terfere.

This was an action of covenant brought by the plain-
tiff in error against the defendants in error, on a bond con-
ditioned for the conveyance of land. The bond is set
out in the declaration by its tenor, on the trial, the cov-
enant offered in evidence, varies from the one described
in the declaration by the omission of the words "of Oc-
tober," the declaration reciting that the second instal-
ment was to be payable "the first day, 1837," whereas
the covenant offered in evidence read "the first day of
October, 1837." The plaintiff moved for leave to amend
his declaration, by inserting the words necessary to make
the covenant recited in the declaration correspond with
the covenant sued on. The court would not allow the
amendment, whereupon the plaintiff suffered a non-suit,
and afterwards moved to set the same aside, which mo-
tion was overruled, and the plaintiff brings his case here
by writ of error.

The omission of the words "of October," was a va-
riance; Cook v. Grahame, 3 Cranch, 229; Shuby v.
Mandeville, 7 Cranch, 208.

Our statute concerning practice at law, authorizes the
circuit court to amend pleadings at any time before final
judgment, on such terms as shall be just; R. C. of 35,
p. 467. This power of amendment is obviously left some-
what to the discretion of the court, and it is not perceived
how any good can result from the reversal of this discre-
tion by this court.

The reasons which influence the court are not always
apparent on the record, and the party may attain his ob-
ject without the interposition of an appellate court.

Judgment affirmed.

MCGOWEN v. WEST.

AUG. TERM,
1842.McGowen
v.
West.

1. A party cannot take advantage of an error in his own favor.
2. An acknowledgment of a debt in terms as follows, "Due A. B. one hundred dollars," is a good promissory note, upon which suit by petition in debt will lie.
3. A person making a parole contract to convey lands, may or may not insist on the protection of the statute of frauds. If he will confess the agreement, and not insist on the statute, its performance will be enforced against him.
4. If upon the sale of land by parole contract the vendee has given his note for the purchase money, the vendor may recover the amount of the note, if he is willing to convey the land, and has done nothing which would give the vendee a right to rescind the contract.

Error to the Monroe Circuit Court.

Opinion of the Court, delivered by Scott, Judge.

West sued McGowen by petition in debt, on an instrument of which the following is a copy :

Due John W. West four hundred dollars, to bear ten per cent. interest from the 25th day of December, 1839 till paid, this 4th day of April, 1840.

DAVID MCGOWEN.

The defendant pleaded that the consideration of the note was the price of a tract of land agreed to be conveyed to him by the plaintiff, and that the agreement was by parole: a demurrer was filed to this plea, and the demurrer sustained. The plaintiff had judgment, and McGowen has brought this writ of error.

It is assigned for error, that the judgment was for a less sum than the plaintiff was entitled to, the interest allowed being less than was due at the rendition of the judgment. This was an error in favor of the defendant, and he cannot take advantage of it; *Williams v. Guyn*, 2 *Saunders*, 476, (8.)

A party cannot take advantage of an error in his own favor.

It is next objected, that the instrument sued on is not a note within the statute authorising a suit by petition in debt. It is said there are no words of promise on it: it is a mere acknowledgment. The statute authorising a

AUG. TERM,
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v.
West.

An acknowl-
edgement of a
debt in terms
as follows:
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one hundred
dollars," is a
good promis-
sory note, up-
on which suit
by petition in
debt will lie.

A person
making a pa-
rol contract to
convey lands,
may or may
not insist on
the protection
of the statute
of frauds. If
he will confess
the agreement
and not insist
on the statute,
its perform-
ance will be
enforced a-
gainst him.

If upon the
sale of land by
parol contract
the vendee has
given his note
for the pur-
chase money,

suit by petition in debt, allows it on all bonds or notes for the direct payment of money or property. Many instances might be shown in which it has been held, that the instrument set out in the petition is a good promissory note; 2 Cowen, Russell v. Whipple, 536.

The judgment of the court in sustaining the demurrer to the defendant's plea, is also assigned for error. It is contended that the obligation of the contract should be reciprocal: that, as by the statute of frauds the plaintiff was not bound to perform his agreement, so the defendant should not be held to the performance of his undertaking. The statute of frauds does not make void parol agreements for the sale of lands: it only declares that no action shall be brought on such contracts.

The person making a parol contract to convey lands, may or may not insist on the protection of the statute of frauds. If he will confess the agreement, and not insist on the statute, its performance will be enforced against him. Such cases are not within the mischief of the statute. The observations of Lord Ridesdale in the case of Lourenson v. Butler, 1 Sch. & Lef. 13, who thought that the contract ought to be mutual to be binding, and if one party could not enforce it the other might, were not sustained by authority; nor has the weight of his name been sufficient to prevent the opinion delivered in that case from being overthrown. The courts of law and chancery in England, both before and since the decree in that case, have held that it was sufficient, if the contract of sale was signed by the party to be charged; Egerton v. Matthews, 6 East.; Allen v. Bennett, 3 Taunton; Seton v. Slade, 7 Ves.; Fowle v. Freeman 9 Ves.; Western v. Russell, 3 Ves., and Beames; Closon v. Bailly, 14 John, R. 487.

If upon the sale of land by parol contract the purchase money is paid, the vendee cannot recover it back, if the vendor is willing to convey the land, and has done nothing which would give the vendee a right to rescind the contract; Dowdle v. Comp., 12 John, 450; Ketchum v. Evertson, 13 John R., 358; Gray v. Gray, 2 J. J.; Mar-

shall; we can see no difference in principle between this case and those where the money has been actually paid.

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1842.

The agreement to convey is not void: it may be relied on for some purposes; 3 Mon., 170, 5 Littel 98. It was remarked by the judge, who delivered the opinion of the court, in the case of Barnes & Al v. Wise, 3 Mon. 170, that it had been held, that a defendant sued on a note given in consideration of a parol agreement to convey lands, may avail himself of the statute as a defence, on the ground that a contract, on which no action will lie is not a valid consideration for another contract, in cases where mutual promises form the consideration of the agreement. This observation was made in a suit in chancery, and the opinion of the court in the cause in which it was delivered, shows that the plaintiff must be in fault before the party giving a promissory note can rescind the contract. In the case before the court the plea of the defendant does not set forth any circumstance from which it can be inferred the plaintiff is in fault; and in our opinion it is necessary to aver and prove the same facts, in order to avoid the note that the party would have to prove, had he brought an action to recover the money, if it had been paid.

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v.
West.

the vendor may recover the amount of the note, if he is willing to convey the land, and has done nothing which would give the vendor a right to rescind the contract.

Judgment affirmed.

JAMISON V. YATES.

The affidavit required to be made by the party appealing from the judgment of a justice of the peace, may be filed in the circuit court, after a motion to dismiss is made.

Appeal from the Monroe Circuit Court.

**Opinion of the Court, delivered by Scott, Judge.*

This was an action commenced in a justices' court against Jamison, where judgment was rendered against

*Napton, Judge, absent from the bench.

AUG. TERM,
1842.

Jamison
v.
Yates.

him, from which he appealed to the circuit court. The circuit court on motion dismissed the appeal, because the affidavit filed at the time of praying it was deemed insufficient.

The affidavit required to be made by the party appealing from the judgment of a Justice of the Peace, may be filed in the circuit court, after a motion to dismiss is made.

Prior to the late revision of the statutes, it was held, that an omission to file an affidavit for an appeal, or the filing an insufficient one, was a good cause for dismissing the appeal. But the provisions of the act of 1835 concerning justices' courts, are construed to warrant a change of this course of proceedings. A proper construction of that statute authorises the circuit court to permit a party to file an affidavit after a motion to dismiss is made. An act of the last session of the general assembly has permitted this in express terms. This statute did not introduce a new rule: it merely removed doubts entertained in relation to the construction of the former law.

Judgment reversed.

BRIGGS AND BRIGGS V. GLENN AND BRYAN.

Where a bond is altered or changed in a material part by the obligee—as by the erasure of the names of some of the obligors, without the assent of the others, all the obligors are discharged.

Appeal from the Circuit Court of Monroe county.

CLARK for Appellants.

*Opinion of the Court, delivered by Tompkins, Judge.**

Glenn and Bryan commenced their suit in the circuit court against Ebenezer and David Briggs, and having obtained a judgment there against the two Briggs's, they appealed.

*Napton, Judge, absent from the bench.

On the trial of the cause, the plaintiffs having given the bond in evidence, the defendants introduced as a witness one William B. Grant, who testified that Samuel Briggs, Robert West, and himself, on the 4th day of February, 1837, the day of the date of the bond sued on, purchased a store of the plaintiffs, for which they executed the said bond, and also a deed of trust conveying the store and legal estate of the witness to secure the payment thereof; that some time during the summer after the bond in question was executed, Samuel Briggs purchased out the interest of witness and West in the store, and by agreement was to release him to Glenn and Bryan; that Glenn informed witness, that he had agreed to release him as soon as Samuel Briggs gave the defendants, and others, as personal security; that some time in the fall, after the bond sued on was executed, the witness saw James R. Abernathy, in the presence of Glenn, erase the name of witness from the bond sued upon; that neither of the defendants were present. Witness is confident the name of Ebenezer Briggs was to the bond when the witness's name was erased, and he believes that David A. Briggs' name was also to it, but is not certain.

Robert West stated that his name was signed to this bond originally as one of the obligors, that it was afterwards erased from it.

The plaintiffs then introduced James R. Abernathy as a witness, who testified that Samuel Briggs, Glenn, and Bryan informed him that Samuel Briggs had purchased out Grant's interest in the store, for which the bond in this case was given, also a deed of trust upon Grant's real estate and the store had been given; that Samuel Briggs had agreed to release Grant and West, upon the two defendants in this cause, with others, signing the bond as personal security; that the witness went out to D. A. Briggs', one of the defendants, and told him that Samuel Briggs had purchased Grant's interest, and had agreed to release Grant and Robert West, and that he, the witness, had been sent to the defendant by Samuel Briggs, to get him to sign the bond, as security, to ena-

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Bryan.

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1842.**

**Briggs and
Briggs
v.
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Bryan.**

ble the said Samuel Briggs to release Grant and West; that he did not tell the defendant that Grant's and West's names were to be erased from the bond; that said defendant, D. A. Briggs, then signed said bond; at the time he signed it, the names of Grant and Robert West were on it; that the same day, after the defendant, D. A. Briggs, signed said bond, the names of Grant and West were erased from the same; that neither of the defendants were present when it was done; that Ebenezer Briggs' name was to the bond before Grant's and West's were taken off; that said Ebenezer told witness that he had authorized Samuel Briggs to sign his name to the bond, but never heard him say any thing about knowing that Grant and West were to be released.

This was all the evidence in the cause. The defendants then prayed the court to give these instructions to the jury.

1st. That if they believed from the evidence that the bond sued on was altered or changed in any material part by erasing the names of any of the obligors, after the defendants or any of them had signed it, without the knowledge or consent of the defendants, they must find for the defendants.

2d. That if they believed that the names of Grant and West, or either of them, were erased or stricken out of the bond without their knowledge or consent, they will find for the defendants.

3d. That if the bond sued on in this case be not the deed of both defendants, the plaintiffs cannot recover in either action.

The court refused them, and, on motion of the plaintiff, instructed the jury, That if they believed the names of Grant and West had been erased from the bond, yet if they believed that either of the defendants assented to it, they would find for the plaintiffs; but if neither of them consented to the erasure, they would find for the defendants.

The defendants excepted to the opinion of the court, both in refusing to give the instructions asked by them-

selves, and in giving those asked by the plaintiffs. The defendants also prayed a new trial because, as they charge, the jury were misinstructed.

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The first section of the act to amend an act regulating practice at law declares that "In actions founded on contract, and instituted against several defendants, the plaintiff shall not be nonsuited by failing to prove that all the defendants are parties to the contract, but may have judgment against such of the defendants as shall have been proved to be parties to the contract, &c. Page 99 of the pamphlet acts of 1838-9.

This section of the act of 13th February, 1839, above cited, would preclude the court from giving the third instruction asked by the defendants.

But it is difficult to conceive why the court should have refused the first and second instructions asked by the defendants. Grant had testified that his name as obligor to that bond had been erased by Abernathy, neither of the defendants being present. That he is confident the name of Ebenezer Briggs was then to the bond as obligor, and that he believed that the name of David A. Briggs was also subscribed to it, but is not certain. Nothing can be more clear than that this bond is void as to both of these defendants, if, when they signed it, they believed that Grant was to be jointly bound with themselves; or if one of them only thought so, it was void as to him, after the erasure of Grant's name, and being made void as to one of the defendants by the erasure of Grant's name, it consequently became void as to the other defendant, who had executed it with the belief that his co-defendant was jointly bound. The only testimony we have to counteract that of Grant, is that of Abernathy. He says that Samuel Briggs, Glenn, and Bryan, had informed him, among other things, that Samuel Briggs had agreed to release Grant and West, &c., and that he went out to D. A. Briggs', one of the defendants, and told him that Samuel Briggs had purchased Grant's interest, and had agreed to release Grant and West, and that he, the witness had been sent to the defendant by Samuel Briggs, to get him

Where a bond is altered or changed in a material part by an obligee, as by the erasure of the names of some of the obligors, without the assent of the others, all the obligors are discharged.

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to sign the bond; that when D. A. Briggs signed the bond the names of Grant and West were to it, and that their names were afterwards erased, neither of the defendants being present.

This is the evidence on which we are to believe, and the jury to find, that these two defendants had assented to the erasure of the names of Grant and West from the original bond, after their own names had been subscribed to said bond, apparently as joint obligors with Samuel Briggs and the said Grant and West. The word "release," is here used in its technical sense, and it might have been expected that the plaintiffs would have proved facts to show the assent of the defendants to the erasure of the names of Grant and West, and not have left a jury to infer from the declaration of the witness, that one of them, David A. Briggs, had been told by him that Grant and West were to be released. It is not even in evidence that either of the defendants knew any thing of the meaning of the word "release," and if we consider for a moment how inaccurately the witness himself uses that word, we shall have little reason to believe that the defendants understood its import. Throughout his testimony he talks of Samuel Briggs releasing Grant and West, his co-obligors, from their joint liability to pay the money for which his bond was executed to Glenn and Bryan.

Every body must see that if they are to be released at all, it can be done by and with the consent of Glenn and Bryan only. While Mr. Abernathy, the acting lawyer, uses law terms so inaccurately, it is unreasonable to presume that these unlearned defendants understood well the legal import of the technical word "release." Nothing appears to me more clear than that it ought to have been left to the jury to find whether these defendants assented either expressly or impliedly to the erasure of the names of Grant and West, after their own had been subscribed as obligors. And if either of them were ignorant that those names were to be erased when his own was subscribed, the bond as to him is void; and if void

as to him, it is also void as to the other, who calculated on the joint liability of his co-obligor.

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The first and second instructions of the defendants ought then to have been given, and that of the plaintiffs ought not to have been given.

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Believing, then, that under the influence of the court, the jury have found what they would not have done, had the instructions refused been given, and that given been refused, its judgment ought in my opinion to be reversed, and the cause remanded.

FUGATE V. GLASSCOCK.

1. A plea in bar waives all matters in abatement, and a defendant cannot set them up after having answered to the merits of the action: therefore, where the plaintiff's demurer to the defendant's plea in abatement was sustained, and the defendant then plead in bar, it was held that the defendant waived the matter in abatement.
2. A memorandum made by the clerk at the foot of a judgment, that it should bear ten per cent. interest, forms no part of the judgment, and if the clerk has erred in making the memorandum, the error may be rectified on motion in the circuit court.

Error to the Audrian Circuit Court.

*Opinion of the Court, delivered by Scott, Judge.**

Glasscock brought an action of assumpsit against Fugate, and afterwards, in aid of his suit, sued out an attachment. The fact set forth in the affidavit on which the attachment issued was, that the plaintiff had good reason to believe, and did believe, that the defendant was about to dispose of his property, so as to hinder his creditors in the collection of their debts.

Fugate, by plea, denied that he was about to dispose of his property so as to hinder his creditors in the collection of

*Napton, Judge, absent from the bench.

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their debts. On this plea issue was joined, and a jury sworn to try it. After the jury was empanelled, a motion was made by the plaintiff to discharge the jury, and for leave to withdraw his replication to the defendant's plea. This motion prevailed, the jury were discharged, and the replication to the plea withdrawn, and thereupon the plaintiff demurred to the plea of the defendant, and the demurrer was sustained. The defendant then filed several pleas in bar to the plaintiff's action. On a trial, a verdict and judgment were rendered for the plaintiff, and the defendant sued out this writ of error.

The cause for demurrer to the plaintiff's plea was, that it only put in issue the fact whether the defendant was about to dispose of his property so as to hinder his creditors in the collection of their debts, instead of the fact that the plaintiff *had good reason to believe, and did believe*, that he was about to dispose of his property, &c.

This question was argued at the last term of this court in the St. Louis district, and a majority of the court held that a plea such as was filed in this suit was good. From the view we have taken of this cause, we do not deem a decision on this question necessary, nor are we required to determine the propriety of the action of the court below in discharging the jury, and permitting the replication to be withdrawn and a demurrer to the plea to be filed. We cannot, however, well see why, if the court has a power to award a repleader, when an immaterial issue has been found, it may not at once arrest its proceedings, and dispose of an issue which it is ascertained will not determine the controversy between the parties. We hold, that when the defendant pleaded over in bar to the action, he waived his matter of abatement. If he thought proper to do so, he might have stood upon the sufficiency of his plea, and after letting judgment by default go against him, might have brought up the question to this court. No principle is better settled than that a party by pleading in bar, waives all dilatory pleas. The object of the defendant's plea is not to determine the merits of the controversy between the parties, but to turn him out of court, and compel him to begin anew. A suitor has obtained a

A plea in bar waives all matters in abatement, and a defendant cannot set them up after having answered to the merits of the action: Therefore where the plaintiff's demurrer to the defendant's plea in abatement was sustained, and the

judgment after a trial on the merits, he has adopted the proper form of action, shall judgment be reversed for a matter not affecting the party's right to recover, and when from the record this court sees that the identical judgment must be rendered on another trial. Why should the defendant be permitted to compel the plaintiff to go into a trial on the merits, when, if the event proves unfavorable, he will be bound or not as he pleases, and when he has been defeated in a trial on the merits, to go back and reverse the plaintiff's judgment, on a matter which he impliedly waived, by pleading over to the action after the demurrer to his plea was sustained. Why compel the plaintiff to try his cause on the merits, when it is to avail him nothing?

If the defendant is wronged by denying him the benefit of his plea, that wrong may be remedied without putting the plaintiff to the expense and delay of a trial on the merits.

As to the refusal of the court, to grant a new trial because the verdict is against evidence, we cannot see any thing in the record to warrant us in disturbing it. If the circuit judges are in contemplation of law, competent to discharge the duties assigned them, why, when they have presided at the trial of a cause, witnessed its progress, observed the demeanor of the witnesses, and thereby ascertained the credit due their testimony, and shall advise us, by its refusal to grant a new trial, that the verdict is just, shall this court with opportunities so far inferior to those possessed by the judges of the circuit court, take upon itself to say, that those judges have erred, and reverse their judgments. It must be a glaring case to induce this court to interfere against the opinion of the circuit court. It neither comports with the due administration of justice, nor the respect due the circuit court, to control the exercise of their discretion on all matters.

It is also assigned for error, that the circuit court erred in awarding, as a part of its judgment, that the damages recovered should bear ten per cent. interest. It seems, after the judgment was entered in the usual form, a memorandum was made at its foot, that it should bear ten per cent. interest. If this were deemed an error in the judgment of the court below, it might be corrected here without remanding

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defendant
then plead in
bar, it was
held that the
defendant
waived the
matter in
abatement.

A memorandum made by the clerk at the foot of a judgment, that it should bear ten per cent. interest, forms no part of the judgment, and if the clerk

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has erred in making the memorandum, the error may be rectified on motion in the circuit court.

the cause. But the memorandum of the clerk at the foot of the judgment, is not considered as a part of the judgment itself. If the clerk has erred in making the memorandum, and it is admitted he has, the error may be rectified on motion in the circuit court.

Judgment affirmed.

SMART V. FISHER.

Where an allowance of a gross sum is made by the county court to executors or administrators, as compensation for their services, it must be equally divided; and one cannot retain the whole sum on the ground that the other had rendered no services. The county court, however, may, where one has performed more than his equal share of labor, allow him a compensation proportioned to his services.

Appeal from the Circuit Court of Callaway county.

Todd for Appellant.

*Opinion of the Court delivered by Tompkins, Judge.**

Fisher sued Smart before a justice of the peace, and obtained a judgment. Smart appealed to the circuit court, where judgment was again given against him, to reverse which, he appeals to this court.

On the trial of the cause it was proved that the plaintiff, the defendant, and one Polly Ratchin, had been appointed executors of the last will and testament of John Ratchin; that they gave bond, and took the oath required by law, and that on final settlement of the estate of the deceased, the county court allowed them, the said executors and executrix, as a full compensation for their services, the sum of \$259.81, and that Smart, having possession of the money, Fisher demanded one-third part thereof, which Smart refused to pay.

*Napton, Judge, absent from the bench.

The defendant, Smart, then offered to prove that the plaintiff had rendered no services, and had been at no expense or trouble in the administration of said estate. To the introduction of this testimony, the plaintiff objected, and the court sustained the objection. The defendant excepted to the decision of the circuit court excluding his testimony.

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The circuit court, on motion of the plaintiff, instructed the jury that the executors and executrix were each entitled to one-third part of the sum allowed by the county court. The defendant excepted to the giving of this instruction; and demanded of the court to give the four long instruction, which amounting to nothing more than an argument against the instruction already given, they will be passed over.

The fifteenth section of the sixth article of the act concerning Executors and Administrators provides, that they shall be allowed for their trouble not exceeding six per cent. on the whole amount of personal estate, and on the money arising from the sale of lands, &c. If, then, any one executor or administrator shall have performed more than an equal share of the labors incident to his duty as such executor or administrator, he who had performed such extraordinary duty ought to have applied to the county court for an allowance proportioned to his labors.

That tribunal, which is by law appointed to decide on the amount of the whole compensation for the administration, has necessarily jurisdiction over each part. The possession, which Smart was proved to have, of the money of the estate, did not authorize him to appropriate one cent of it without the express order of the court; and, in contemplation of law, it was as much beyond his reach as if it had been locked in an iron chest, of which the court kept the key. The appropriation, then, of a gross sum of \$259.81 being made as compensation for the three, the presumption necessarily arises, that it is to be equally divided: but if any one of the three thinks himself entitled to a greater share than the third, it is his duty to apply to the court to settle the worth of his particular services. Either of the other two executors had as much right to the possession of that money

Where an allowance of a gross sum is made by the county court to executors or administrators, as compensation for their services, it must be equally divided: and one cannot retain the whole sum on the ground that the other had rendered no services. The county court, however, may, where one has performed

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more than his
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sation propor-
tioned to his
services.

as Smart. He, by taking to himself the whole allowance, and refusing on demand to pay to Fisher the third, makes himself liable to Fisher for so much money by him had and received for Fisher's use.

The circuit court, then committed no error in giving the instruction asked by the plaintiff there. Its judgment is therefore affirmed.

WARD, AND OTHERS, V. STEAM BOAT LITTLE RED.

An immaterial averment alleged by way of inducement merely, need not be proved, although descriptive of a written instrument.

Appeal from the Circuit Court of Cooper county.

Todd for Appellants.

MILLER AND LEONARD for Appellee.

Opinion of the Court, delivered by Napton, Judge

This was an action instituted under our statute regulating proceedings against boats and vessels. The statement of the plaintiffs' cause of action is couched in the ordinary form of a declaration in case. This declaration avers, that whereas, the plaintiffs were owners of a certain horse ferry boat and horse gear appurtenant thereto, and the same was used at a certain ferry kept at Rocheport, on the Missouri river, and owned by the complainants. They, the complainants, did, prior to the first of June last, to wit, on the first of February, rent the use of the said ferry and the boat for one year, from and after the day and year last aforesaid, to a certain James F. Ware, and placed him in possession of the said ferry, and the boat and gear aforesaid; and by the agreement between the complainants and said Ware, they were to receive one-half of the proceeds made at the ferry, and the rights of ferriage owned by the complainants and

leased as aforesaid to the said Ware, extended to and belonged to both banks of the river, &c. AUG. TERM,
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After stating the contract with Ware, in these terms, by way of showing their reversionary interest, the declaration proceeded to set forth the gist of their cause of action against the steam boat Little Red, which was the loss of their ferry boat and gear by the negligence of said steam boat, in towing their ferry boat from Nashville to Rocheport, in compliance with a contract between Ware and the said steam boat.

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On the trial, the contract between the owners of the ferry boat and Ware was proved to be as follows: on the 1st of February, 1839, Ware rented the ferry for one year. With the ferry, he rented a horse boat, five set of gear, and horses to work the boat. He was to find provisions for the horses, and keep the boat in good repair, and return the boat, gear, and horses at the end of the year; in consideration of which, he agreed to give the owners one-half of the nett proceeds.

The court held, the contract proved varied from that described in the declaration, and for this the plaintiffs were nonsuited. They moved to set the non-suit aside, but the court overruled their motion, and from this judgment they appealed to this court.

The case of *Briston v. Wright*, (Douglass, 640,) is the leading case on this subject, and is relied on to sustain the judgment of the circuit court. In that case, Lord Mansfield held, that in an action of tort, where a contract is alleged by way of inducement merely, it must be proved as laid. One of the avowed objects designed to be effected by Lord Mansfield in this decision was, to prevent pleaders from making their declarations unnecessarily long, and thereby increasing the costs of the suitors.

The doctrine of *Briston* and *Wright* has been adhered to in England. In the case of *Gwinnett v. Phillips* and others, the judges admitted the rule in *Briston v. Wright*, but said it was confined to cases of *records and written contracts*.

In the case of *Cunningham v. Kimbell*, (7 Mass. R. 68,) the case of *Briston v. Wright* is, *sub silentio*, overruled; for though the case was cited at the bar, the court held a con-

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trary doctrine, and refused to send the case back for a new trial, because the evidence at the trial varied from the declaration.

The case of *Wilson v. Codman's executors*, (3 Cranch, 193,) shows the opinion entertained by the Supreme Court of the United States of the doctrine of *Briston v. Wright*. The action was brought by an assignee of a promissory note, and the declaration averred that the payees of the note, "by their certain writing endorsed on the said note, assigned the said note to the plaintiff, for *value received*." On the trial it appeared that the note was endorsed as follows, "We assign this note to J. C., *without recourse*."

The question was as to the effect of this variance. Judge Marshall, who delivered the opinion of the court, said, "The strictness with which, in England, a plaintiff is bound to prove the averments of his declaration, although they may be immaterial, seems to have relaxed from its original rigor. The reasons stated by Lord Mansfield, in the case reported by Douglass, for adhering to the rule, do not apply to the United States, where costs are not affected by the length of the declaration. Examining the subject with a view to the great principles of justice, and to those rules which are calculated for the preservation of right and for the prevention of injury, no reason is perceived for requiring the proof of a perfectly immaterial averment, unless that averment be descriptive of a written instrument, which by being untruly described, may by possibility mislead the opposite party. Where, then, the averment in the declaration is of a fact dehors the written contract, which fact is in itself immaterial, it is the opinion of the court that the party making the averment is not bound to prove it."

An immaterial averment, alleged by way of inducement, need not be proved, although descriptive of a written instrument.

The rule in England, then, is, to say the least, a harsh rule, and adopted for reasons which have no applicability here. The rule is still adhered to by the Supreme Court of the United States so far as it applies to averments descriptive of records or written contracts. But when the averment is of a fact at the same time extrinsic and immaterial, though it may be of a contract, the principle is not held applicable. In the case of the *Friendship*, (1 Gallis, 45,) it was held, that

immaterial averments may be rejected; but where an averment is of substance and is more specific than necessary, and cannot be rejected without a fatal defect, it must be proved as laid.

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In the case now before the court, the averment of the particulars relating to the consideration of the lease from the owners of the ferry boat to Ware, was immaterial, and being made in relation to a contract which was mere inducement to the action, the plaintiffs were not bound to prove it.

The judgment of the circuit court will therefore be reversed, and the cause remanded for further proceedings.

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Any contract made in consideration of an act forbidden by law, is absolutely void, and the illegality of the contract will constitute a good defence at law, as well as in equity. Therefore, where a person sold a town lot before the plat of the town was made out, acknowledged, and deposited in the Recorder's office, as prescribed by the third section of the act concerning "Towns," (R. C. 1835, p. 599,) the contract was held absolutely void.

Error to the Circuit Court of Marion county.

GLOVER for Plaintiff.

Opinion of the Court, delivered by Napton, Judge.

Ringer was the assignee of a note, given by Downing to one William Muldrow, for two hundred dollars. The action on the note was petition in debt, and the defendant pleaded nil debit, and two pleas of fraud generally. Issue was taken; and on the trial, defendant offered to prove that the consideration of the note was a town lot in the town of Philadelphia, (Marion county,) and the sale was made and the note given anterior to the acknowledgment, certifying, depositing, and filing of the plat of said town in the recorder's office of Marion county. The court rejected the pro-

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posed proof, and this is the only error complained of in this court.

The third section of our statute concerning plats of towns and villages, provides, "that if any person sell, or offer for sale, any lot within any town, village, or addition, before the map or plat be made out, acknowledged, and deposited as aforesaid, (in the recorder's office,) such person shall forfeit a sum not exceeding three hundred dollars for every lot which he shall sell or offer to sell."

It was formerly doubted in England, whether an agreement was void which was not expressly made so by a statute, which merely inflicted a penalty for doing the act: but in *Bartlett v. Vinor*, (Carth. 252, Chitty on Con., 230,) Lord Holt said, "Every contract made for or about any matter or thing which is prohibited, and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflict a penalty on the defaulter; because, a penalty implies a prohibition, though there are no prohibiting words in the statute."

This is the established modern doctrine, and the distinction between *mala prohibita* and *mala in se*, is discarded. Chitty on Con., p. 232. The cases in this country are uniform in declaring the principle, that if a note or other contract be made in consideration of an act forbidden by law, it is absolutely void, and the illegality of the contract will constitute a good defence at law, as well as equity. 2 Kent's Com., 466; *Hunt v. Knickerbocker*, 334.

✓ The penalty inflicted by the act concerning plats of towns and villages, implies a prohibition against the sale of lots before the requisitions of the act are complied with, and the courts will not enforce a contract entered into against the spirit and policy of the statute. The circuit court erred in rejecting the testimony offered by the defendant, and the judgment is therefore reversed, and the cause remanded.

McELROY V. CALDWELL.

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Where a credit has been endorsed on a bond, or note, and is afterwards erased, it devolves upon the obligee or payee to account for the erasure. The endorsement, if made with the consent of the obligee or payee, amounts to an admission of payment, and if not made with his consent, it devolves upon him to prove that fact.

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Error to the Monroe Circuit Court.

Opinion of the Court, delivered by Napton, Judge.

This was an action by petition in debt, brought by McElroy against Caldwell and William Buckner, Jr. Buckner not having been served with process, the suit abated as to him. The foundation of the action was a bond executed by Buckner and Caldwell for \$1145.54.

Pleas of nil debit, fraud, and payment, were put in by defendant, Caldwell, and issues taken to the country.

On the trial, the plaintiff gave in evidence the bond, with several credits endorsed thereon. The last credit endorsed was for \$707 61 cents, and appeared to have been erased by drawing a pen through it. The endorsement was not in the handwriting of McElroy. The defendant then proved by Saunton Buckner, that he (witness) wrote the endorsements; that at the time he did so, he was clerk for William Buckner, the partner of Caldwell, and had no recollection of any attempted erasure. The erasure, witness said, was in a different kind of ink from the endorsement, and must therefore have been made subsequently to the endorsement. Witness stated that he would not have endorsed the credit, without the assent of William Buckner and McElroy, but that the transaction was so old, that he could not speak positively. The witness also stated that he had entered a similar credit in the books of Caldwell and Buckner, corresponding in date and sum with the credit endorsed on the bond.

There was no other material testimony touching this credit, which was the only matter in controversy.

The court instructed the jury, that if they believed from the evidence, that the credit for \$707.61 was placed upon

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said bond by the assent of the plaintiff, and of the obligees in said bond, it was good legal evidence of payment unless the plaintiff showed that it was afterwards erased by the consent of parties.

The jury found a verdict for the defendant, and judgment was given accordingly. To reverse this judgment, the case has been brought here by writ of error.

We are unable to perceive any substantial objections to the instructions of the circuit court. Had the endorsement been made without the consent of the plaintiff, it would have been no evidence of the credit, not having been in his handwriting, and he could have erased it at pleasure. But an endorsement of a credit, made by his consent, is as binding as though made in his own handwriting; and the note being presumed by law to be in his possession, it devolves on him to account for the erasure. The endorsement, if made with his consent, amounts to an admission of payment, and if not made with his consent it devolves upon him to prove that fact.

It is still evidence proper for the consideration of the jury, and they may give to it such weight as in their estimation it deserves. Whether the credit was entered with the consent of the obligee was a question of fact proper for the jury, and the court also left to the jury to say whether the erasure was made by consent of parties.

We are of opinion there was no error in this, and the judgment will therefore be affirmed.

DECISIONS

OF THE

SUPREME COURT OF MISSOURI.

THIRD JUDICIAL DISTRICT,

SEPTEMBER TERM, 1842.

WITHINTON & OTHERS V. WITHINTON & OTHERS.

1. The statute concerning "Wills," (R. C. 1835, p. 617) requires that the subscribing witnesses to a Will should attest, not only the corporal act of signing, but the sanity of the testator at the time of signing. Proof by one of the subscribing witnesses only, that the testator was of sound mind, is insufficient.
2. The judgment of the circuit court will not be reversed for improperly refusing to give an instruction, when the giving of the instruction would not have availed the party asking it.

Error to St. Louis Circuit Court.

GAMBLE & SPALDING for Plaintiffs in Error.

GEYER for Defendants in Error.

Opinion of the Court, delivered by Tompkins, Judge.

Thomas Withinton and others, defendants in error, filed their petition in the circuit court of St. Louis county, stating that Thomas Withinton, senior, sometime in the month of March, 1838, died, as they believed, intestate; and that at the August term of the county court next succeeding, viz: in August, 1838, Emilie Withinton, widow of William Withinton deceased, appeared before the said

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court, and produced a paper writing with the certificate of acknowledgment thereof, and also a certificate of the record thereof, and offered to prove the same as a will; and that probate thereof was allowed by the said county court, as the last will and testament of said Thomas Withinton senior, deceased. The will was in the words following, viz: Know all men by these presents, that I, Thomas Withinton, senior, of the State of Missouri and county of St. Louis, for and in consideration of the sum of one dollar to me in hand paid by William Withinton, of the county and State aforesaid, the receipt of which I do hereby acknowledge, have granted, &c., unto the said William Withinton, the tract of land whereon I now live, at my decease, containing, &c., to have and to hold the said tract of land, with all and singular, the improvements, &c. In testimony whereof, I hereunto set my hand and seal, this 17th day of May, A. D. 1830, Thomas Withinton, in presence of Joseph Walton. Then followed an acknowledgment of the same before a justice of the peace, as follows: State of Missouri, county of St. Louis--ss: Be it remembered, that on the 17th day of May, 1830, personally came Thomas Withinton, who is personally known to me to be the person who signed the foregoing instrument of writing; who acknowledged it to be his act and deed; and that he executed the same for the purpose therein mentioned, &c. It appears by the clerk's certificate to have been recorded on the 31st of May, 1838. The defendants below, plaintiffs in error, here appeared, and an issue was made up whether this was the will of Thomas Withinton, senior. The issue being found for the plaintiffs, defendants in error here, judgment was accordingly given; to reverse which this writ of error is prosecuted.

Joseph Walton, the subscribing witness, being called, stated that he was present in the house of the said Thomas Withinton, senior, when the said instrument of writing was written by Fergus Ferguson, since deceased, and when the acknowledgment of the same was taken and written by the said Ferguson: that he signed his name

as witness to the said instrument, at the request of the said Thomas Withinton, senior, but does not recollect to have seen said Withinton sign said writing: he was present at the time of the writing and executing of said instrument at the request of said Thomas Withinton, senior, made to him some two or three days previous, and saw said Fergus Ferguson write said instrument, and heard him take the acknowledgment of said Withinton thereto, and saw said Ferguson write said acknowledgment. As well as the witness recollects, said Thomas Withinton retained said instrument of writing in his own possession, and said that he meant to keep the land mentioned in the same until his death: that he would not give the right to any person to dispossess him during his life; and that he would keep said instrument during his life. Witness never saw said instrument delivered by said Thomas to any person; and, as well as he recollects, said William Withinton was not in the house during the time of writing and executing the instrument aforesaid: nor does he recollect to have seen him at the house during that day. The writing was acknowledged by the said Thomas, and witnessed by the said Walton on the same day.

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The plaintiff's below, defendants in error, prayed the court to instruct the jury, that the instrument of writing produced as the will of Thomas Withinton, senior, deceased, is not duly attested as a will according to the laws of the State. This instruction the court gave, and the plaintiff in error excepted. The plaintiff in error prayed the court to instruct the jury to this purpose: 1st. That the certificate of acknowledgment before the justice of the peace, is equivalent to the signature of a witness: and 2nd., That the intention of the testator to make a deed when he signed said instrument, does not prevent said instrument from being and operating as a will. To pass over the last question raised by the defendant below, whether a deed in form made to take effect, as in this case, after the death of the maker, is a will, I will enquire whether this instrument is attested as required by the statute. The fourth section of the act

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respecting wills declares that, "Every will shall be in writing, signed by the testator or testatrix, or by some person by his direction, in his presence; and shall be attested by two or more competent witnesses subscribing their names to the will, in the presence of the testator."

The British statute concerning devises of land is similar to our statute of wills, except that it requires three witnesses. Powel on devises says, the third and fourth solemnities required by this statute are, the attestation and subscription. In the application of this word "attested," to the act of executing the will, the legislature has been considered in the construction of it, as having called the attention of the persons attesting to three several objects; one of which applies to the testator himself, the other two to the instrument: First, that which relates to the testator, is with regard to his sanity, an attention to which is in the witness a necessary inference, as well from the nature of the transaction as from the objects of the statute. The name of the instrument necessarily imports, that there must be a capacity of disposing in the devisor at the time of executing it; and that is so essential to its validity, that a formal declaration of his sound and disposing mind, is become the introductory clause in such instruments. In the construction, therefore, of this statute, it has been held that the legislature, when it required witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing, &c. The business then of the person required by statute to be present at executing a will, is not barely to attest the corporal act of signing, but to *try, judge, and determine* whether the testator is compos to sign. In conformity with this doctrine, it was said by Lord Hardwicke, in the case of Wallis v. Hogson, 2 Atk., 56,—“That it had been determined over and over, that the devisee must show the devisor to have been of sound and disposing mind, when a will was to be established as to real estate; proving that it was well executed according to the statute of frauds, and perjuries was not sufficient;” see p. 69 of 1st Am. edition. This reasoning applies with pe-

culiar force to a will made under our statute, which, in express terms, requires the testator to be of *sound mind*; see 1st section: whereas the author tells us that in the construction of the British statute, it had been held that the legislature, when it required witnesses to attest the signing, must, by implication, have required them to attest the capacity of signing. What the English parliament then required by implication only, our statute of wills requires in express terms. For, by our statutes, none but persons of sound mind can make a will. What, under our statute, was the duty of the justice who took the acknowledgments of this instrument of writing, which the probate court has set up as a will? Certainly it was nothing more than to ascertain that the maker of the writing, and the person acknowledging it were the same. Walton, the subscribing witness, might have proved the execution, and the justice's certificate of the proof would equally, with the acknowledgment of the maker, have entitled the instrument of writing to a place on the record; section 13, of the act regulating conveyances, p. 121 of the digest of 1835. His certificate, if he had certified any thing else than the identity of the maker and of the person acknowledging, would then have been void, inasmuch as he would have certified what the law did not require. It cannot then be inferred from that certificate of the justice that the maker was of sound mind. One witness only, then, has proved this testator to have been of sound mind, and the law requires two: the written instrument is not then a will. Again, suppose there were no subscribing witness to this instrument, and that it could not take effect as a deed, would not the party producing it be compelled to prove the hand writing of the maker, before he could call on the justice to prove that the maker had acknowledged it before him? or would not that be the only testimony to entitle the party to read it in court? Witnesses are called in case of deed, that the party claiming against the grantee may know, not only the truth of the signing the corporal act, but, also, whether the deed were made under circumstances that indicate

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The statute concerning "wills," (R. C., 1835, p. 617,) requires that the subscribing witnesses to a will, should attest, not only the corporal act of signing, but the sanity of the testator at the time of signing. Proof by one of the subscribing witnesses only that the testator was of sound mind, is insufficient.

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Withinton & others v. Withinton & others. that it was the voluntary act of the maker. For, as above observed, the certificate of acknowledgment, or the proof before the justice, is for no other purpose than to establish the identity, in order to let it be put in the record for the purpose designated by the statute. I am inclined to believe, that the court committed error in refusing to instruct the jury, that the intention of the testator to make a deed, when he signed the said instrument of writing, does not prevent the said instrument from being and operating as a will. It was the fault of the defendant to ask the instructions: the point does not seem to have been controverted by the plaintiff below: he did not at least ask a contrary instruction. But the judgment must not be reversed because this instruction was refused, which, if it had been given, could have availed the defendant nothing, the other being given which the plaintiff had asked. The judgment of the inferior court is therefore affirmed.

The judgment of the circuit court will not be reversed for improperly refusing to give an instruction, when the giving of the instruction would not have availed the party asking it.

RAMSEY V. GOODFELLOW.

Appeal from St. Louis Court of Common Pleas.

SMITH for Appellant.

POLK for appellee.

Opinion of the Court, delivered by Scott, Judge.

This cause is, in all respects, similar to that of Weber v. Schiniesser, decided at this term: and the principle of that case will determine it.

Judgment affirmed.

FARWELL IMPEADED WITH FARWELL & FAY V. KENNETT SEPT. TERM,
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1. A bill drawn payable "in currency," is not a bill of exchange within the meaning of our statute concerning "bills of exchange," consequently the holder is not entitled to the damages allowed by the statute, in cases of dishonored bills. Farwell impleaded with Farwell & Fay v. Kennett, White & Kennett.
2. The courts will judicially take notice, in what light the medium or subject matter of payment of a note or bill is regarded in common understanding; and where a bill or note is made payable in "currency," the value of the "currency," at the time of payment, must be ascertained in the same manner as the value of any other commodity: therefore, where a bill was drawn for "two thousand dollars in currency," and protested for non-payment, it was held, that the holder could only recover the specie value of current bank notes of the nominal amount of two thousand dollars.

Appeal from St. Louis Court of Common Pleas.

CROCKETT for Appellant.

Opinion of the Court, delivered by Scott, Judge.

This was an action brought by the appellee against the appellant, on the following instrument:

GALENA, Nov. 26, 1841.

Messrs. L. & A. G. Farwell, & Co.

Four months after the date hereof, pay to the order of Henry Convith, two thousand dollars, in currency, for value received.

A. CONVITH, & Co.

This order was directed to L. & A. G. Farwell, & Co., at St. Louis, and accepted by them, and was afterwards endorsed by the payee to the appellees. The appellant was a member of the firm of L. & A. G. Farwell, & Co. A judgment by default was taken against the appellant, and the damages were ascertained by the court without a jury. The court allowed damages as in cases of dishonored bills of exchange. The appellant moved in arrest of judgment, and to set aside the verdict, for the reasons that the court regarded the instrument sued on as a bill of exchange, and allowed damages accordingly; and because the court itself as-

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A bill drawn payable "in currency," is not a bill of exchange within the meaning of our statute concerning "bills of exchange," consequently the holder is not entitled to the damages allowed by the statute, in cases of dishonored bills.

essed the damages, instead of awarding a writ of enquiry. The record presents the question, whether a bill drawn payable in currency, is such an instrument as entitles the holder to the damages allowed by our statute to the payees of bills of exchange, in the event of their being dishonored. There is no doubt about the general principle, that a bill of exchange, or negotiable promissory note, must be for the payment of money in specie; Bayley 10, Chitty 182.

In order to show that the instrument declared on is a bill of exchange in the contemplation of our statute, reference has been made to the case of *Judah v. Harris*, 19th, J. R., 144, in which it was held, that a promissory note, payable in bank notes, current in the city of New York, was a negotiable note. In support of this opinion, the court refers to a previous case in the same court, in which it was held, that a note payable in York State bills, or specie, was negotiable; 9 John. 120. In this last case the court cites, with approbation, an observation of Lord Mansfield in the case of *Miller v. Reed*, 1 Bur., 457, that these notes are not like bills of exchange, mere securities or documents for debts, nor are so esteemed; but are treated as money in the ordinary course and transactions of business by the general consent of mankind, and in payment of them when a receipt is required: the receipts are always given as for money, not as for securities or notes.

In both the cases cited from *Johnson*, the court takes judicial notice, that in common usage and common understanding, the notes and bills mentioned in them were regarded as cash; and it is because they were so regarded, that the notes in those cases were held to be negotiable.

In the case of *Jones v. Fales*, 4 Mass., the court remarked, "It is the common sense of the people and must be our understanding, that when the word bills is used as a subject or medium of payment, the parties intend bank notes of some description." The case of *Lampton v. Haggard*, 3rd. Mon. advances the like doctrine; and it is there observed, that the propriety of so doing, results as a necessary consequence from the principle universally admitted, that the expressions of contracting parties must be taken according to their popular meaning.

In the case of *Luber. v. Goodrich*, 5 Cowen, 126, it was held, that a note payable in Pennsylvania paper currency, or New York, to be current in the State of Pennsylvania, or State of N. York was not negotiable. The judge in delivering the opinion of the court remarked:—"The note is not payable in cash. We may officially take notice, that our own bank paper is in conformity with common usage and common understanding, regarded as cash. But we cannot be supposed judicially, to know the value of the paper currency of other States."

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The cases cited fully establish the principle, that the courts will judicially take notice in what light the medium or subject matter of payment of a note or bill, is regarded in common understanding. If this principle is to govern us in the construction of the instrument now under consideration, and that it is we cannot doubt, we must come to the conclusion that it is not a bill of exchange within the meaning of our statute. In both of the cases cited from New York, the court upheld the negotiability of the instrument, because in common understanding, the medium of payment was regarded as cash. At the date of this bill, currency was not regarded as cash by the community. In framing their notes and bills, the word was adopted with the express view of preventing a demand for cash or specie. The value of currency was below the specie standard and fluctuating, receding from and advancing to the value of specie. The word currency was introduced in the sense in which it is understood after we were afflicted with a depreciated currency, and to prevent a demand for lawful money. Experience has taught us that there is a wide difference between the currency contemplated by law and the actual currency. The parties must have had these considerations in their mind, otherwise they would not have deviated from the usual course of framing such instruments, but would have simply made the bill payable in dollars. This then is conclusive of the question; and the cases cited from New York, so far from being authority to show that this bill should be deemed negotiable within the meaning of the statute, drive us to the opposite conclusion.

The courts will judicially take notice, in what light the medium or subject matter of payment of a note or bill is regarded in common understanding; and where a bill or note is made payable in "currency," the value of the "currency," at the time of payment, must be ascertained in the same manner as the value of any other commodity: therefore, where a bill was drawn for "two thousand dollars in currency," and protested for non-payment, it was held, that the holder could only recover the specie value of current bank notes of the nominal amount of two thousand dollars.

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A case has been cited from 1 Hammond's, Ohio R., in which it was held, that a note payable in currency, would be construed to mean current money; and the case above cited from 9th John. is referred to as sustaining the principle. It does not appear from the report, whether currency was regarded as cash or not at that time in Ohio; if it was, the opinion is sustained by authority, otherwise it is opposed to all the cases on the subject. If it is to be regarded as an authority to tie us to the face of the instrument for its interpretation, without regard to the common understanding of the community, it is equally opposed to authority.

If currency, at the date of the bill, was not specie or its equivalent, then it became necessary to ascertain its value, and the demand of the appellee could not be said to be liquidated. The construction of the bill is, that the party would pay its amount in currency; and a tender of the medium used as currency would have discharged the acceptor; and if he failed to pay in currency at the proper time, then he became liable for two thousand dollars in currency, the value of which in specie would be ascertained in like manner as the value of any other commodity. A judgment could not be rendered for currency, but only for dollars and cents to be paid in specie. The court then erred in assessing the damages, and should have awarded a writ of enquiry; and no damages were due, as on a dishonored bill of exchange. Judgment reversed and cause remanded.

PRATHER V. McEVVOY, TO USE OF NELSON.

A note given for a certain sum, payable in *work*, cannot be set-off in an action founded on a debt due in money; although the debt accrued for the same kind of work stipulated for in the note.

Appeal from the St. Louis Court of Common Pleas.

J. B. KING for Appellant.

Opinion of the Court, delivered by Tompkins, Judge.

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McEvoy sued Prather before a justice of the peace, and the justice having given a judgment in his favor, Prather appealed to the court of common pleas, and that court having also given a judgment against him, he appealed to this court.

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v.
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the use of Nel-
son.

The account of McEvoy, on which the suit against Prather was founded, was for stone cut work, and the amount of the judgment was ninety dollars, the amount of the account. As an offset to this account, Prather offered in evidence a note of McEvoy, of which the following is a copy:

"Due Messrs. Blount and Baker the sum of eighty-four dollars, which is to be paid in cut stone work."

This note was assigned by Blount and Baker to Prather. The court of common pleas refused to allow this note of the plaintiff, McEvoy, to be given in evidence as an offset to the account of the plaintiff, and this act of the court is assigned for error. Men give their notes for so much money, to be paid in property, labor, &c., because it is easier for a man in this western extremity of the Union, and perhaps every where in the civilized world, to pay in some species of property or labor than in money. A cultivator of tobacco or of hemp would much more easily pay one hundred dollars in the article he cultivates than in money. He must first sell the article produced, to raise the money, which is manifestly unjust. In the present case, this man had earned his money, and probably had calculated on paying some money debt with what was due to him from Prather, or he might have calculated on applying it to the purchase of something necessary for the comfort of his family; and he had a right to at least a reasonable time to do the work after it was applied for. The profit of his business depended on the quantity of material he could prepare and vend; and after he acquired the right to have and demand from the appellant the sum of ninety dollars for work and labor

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founded on a
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crued for the
same kind of
work stipula-
ted for in the
note.

done, &c., it is very unjust to tell him that he shall be paid in a note of his own, calling for work and labor only. Take the case of a retail merchant who executes his note for ninety dollars, payable in such goods as he keeps to sell. It would be very unjust that a person who already owed him ninety dollars for other goods, &c., sold, &c., should be allowed to pay his debt with the merchant's note for ninety dollars, payable in goods.

The judgment of the court of common pleas must be affirmed.

Opinion of Scott, Judge.

In my opinion, the appellant had no right to use the note he held as a set-off, until he had shown the appellee in default, by proving a demand and refusal. When a mechanic undertakes to pay or deliver specific articles of his trade, before his debt can be converted into money, it is necessary to make a demand upon him for the specific articles at his shop. Chipman on Contracts, p. 20. I concur in affirming the judgment.

WEBER V. SCHMEISSER.

A party will not be heard in relation to a matter in which he is contradicted by the record.

Appeal from the St. Louis Court of Common Pleas.

WHITEHEAD for Appellant.

Opinion of the Court, delivered by Scott, Judge.

This was an action commenced by the appellee against the appellant in a justices' court, on an account. An appeal was taken to the court of common pleas, where the appellee had judgment, from which an appeal has been taken to this court. After the trial, in the court below,

the appellant moved to set aside the judgment, and filed an affidavit in support of his motion, which set forth the causes why he and his counsel were not in court when the cause was tried. The affidavit further alleged that the party had a just defence to the action. The affidavit of the appellant appears contradicted by the record. This is never allowable: a party cannot gainsay the record. The entry in the record is, that the parties appeared by their attorneys respectively, and neither party requiring a jury, all and singular the premises being seen and heard, and by the court here fully understood, the court doth find, &c. That it appears the party was present by his attorney, dispensed with a jury, and submitted his cause to the court. These facts cannot be contradicted.

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Weber
v.
Schmeisser.

A party will
not be heard
in relation to
a matter in
which he is
contradicted
by the record.

Judgment affirmed.

BOBB V. LAMBDIN AND BENNETT.

A party who seeks to reverse the judgment of the circuit court for refusing to grant him a new trial, where all the instructions asked by him were given, must make out a case free from doubt.

Appeal from the St. Louis Court of Common Pleas.

GAMBLE AND WALKER for Appellant.

DARBY AND KNOX for Appellees.

Opinion of the Court, delivered by Tompkins, Judge.

Lambdin and Bennett commenced an action of assumpsit against John Bobb, John B. Bobb, and Charles Bobb, as partners in business. They obtained a judgment against Charles Bobb, which in this appeal he seeks to reverse. Charles Bobb pleaded to the action, and the plaintiffs do not prosecute their suit against John Bobb and John B. Bobb. The two first counts in the declaration are special, and demand damages of the defendant

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for failing to furnish a quantity of rope according to a contract set out in those counts ; the third is a common count for money lent and advanced to, and paid, laid out and expended, &c., for the use of the defendants.

On the trial it was proved, that John B. Bobb, by the name and description of John B. Bobb & Co., of Pike county, Missouri, of the one part, and Lambdin & Bennett of Natchez, State of Mississippi, of the other, made an agreement in writing, by which John B. Bobb & Co. promised to furnish three hundred coils of bale rope of a certain weight, at seven and three-fourth cents per pound. In the course of a year the price of rope nearly doubled itself, and the defendants in the action, John B. Bobb, John Bobb, and Charles Bobb, failed to furnish the rope ; and Lambdin and Bennett brought this suit. The plaintiffs proved the payment to John B. Bobb of more than five hundred dollars on account of this contract, and much evidence was given to prove a partnership of John B. Bobb, John Bobb, and Charles Bobb, in the making of rope, &c. Evidence was given of admissions on the part of John Bobb, that John B. Bobb was a partner ; but there was no evidence of any admission of that fact by Charles Bobb. There was much evidence of the employment of John B. Bobb about the factory as a superintendant, and as a maker of contracts with laborers employed in the factory. The court, on motion of the defendants, instructed the jury, 1st, If they find for the defendants, they will say so in their verdict ; but if they find for the plaintiffs, and assess damages for them, then they will state in their verdict, under which count in the declaration. 2d. The plaintiffs cannot recover in this action on either of the two first counts of the declaration, as neither of said counts sets forth any legal cause of action against the defendant, Charles Bobb. If the jury believe from the evidence, that John B. Bobb was the only person originally liable for the money originally advanced by the plaintiffs on account of the contract offered in evidence by them, the defendant, Charles Bobb, cannot be made liable therefor by any declarations or

promises to pay the same subsequently made by the defendant, or John Bobb, unless they shall be satisfied from the evidence that such promise was made to the plaintiffs or their agent in writing, and signed by the party to be charged, or unless the same was received to the use or benefit of the defendant.

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And the court also further instructed the jury as follows :

This suit, as it now stands, is against Charles Bobb alone, it having been dismissed as to the other two defendants. If the jury believe that Charles Bobb was not a partner with John B. Bobb, in the firm of John B. Bobb & Co., and that Charles Bobb, or any member of the firm, received any sum or sums of money on account of, or in advance of the contract read in evidence, the jury must find for the plaintiffs as to that amount, under the third count of the declaration. If the jury believe that Charles Bobb was not a partner of John B. Bobb, but that John B. Bobb was their agent ; and that the plaintiffs advanced certain sums of money to the firm of which Charles Bobb was a member, which sums of money were received by any member of the firm, or by their authorized agent for their use, they will find for the plaintiffs for the amount of such sum of money, under the third count of the declaration.

The jury found for the plaintiffs on the third count ; assessed their damages to \$383.25. Judgment was given accordingly, and a new trial was prayed for the usual reasons, and the overruling of the motion is complained of as error committed by the court of common pleas.

A party who seeks to reverse the judgment of the circuit court for refusing to grant him a new trial, where all the instructions asked by him were given, must make out a case free from doubt.

All the instructions asked by the defendant, Bobb, were given ; and the court even gave in his favor instructions which he did not ask. Indeed, the plaintiffs might rightfully have complained that the court instructed the jury, on the defendant's motion, that the plaintiffs could not recover in this action on either of the two first counts of the declaration.

Evidence had been given to prove a partnership of John B. Bobb, John Bobb, and Charles Bobb. That evi-

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dence was certainly of a character rather contradictory. But a jury might in some cases give credit to such testimony. Payment of more than five hundred dollars had been proved to John B. Bobb by the plaintiffs, and their verdict against the defendant was for a much smaller sum. It seems to me that the defendant has no reason to complain, and could have had none even if they had found a larger sum against him. It may be very true that not one cent of this money was received for his use or benefit; it may also be true that no partnership ever existed betwixt himself and John B. Bobb. Yet it was owing to his own negligence, if they were not partners, that John B. Bobb was enabled to hold himself forth to the world as a partner: indeed, it often happens that the community have no other means of ascertaining who are partners than the means furnished by the conduct of such parties. I can see no reason for reversing the judgment of the court of common pleas. Its judgment is therefore affirmed.

SETTLE AND BACON V. DAVIDSON AND SAUNDERS.

A bond given by one of several debtors for a debt due by simple contract, is an extinguishment of the simple contract debt, and becomes the sole debt of him who executed the bond.

Appeal from St. Louis Court of Common Pleas.

DARBY AND KNOX for Appellants.

Opinion of the Court, delivered by Scott, Judge.

This was an action by petition in debt on a promissory note, commenced by appellees against the appellants. The appellants were partners, and the note was executed in their partnership name. The parties went to trial on an issue to the plea of nil debit, and other issues, and the appellees obtained judgment, from which this appeal is taken.

It appears from the evidence preserved in the bill of exceptions, that after the execution of the note sued on, an account was opened between the appellees and Thos. G. Settle, one of the appellants. And the note sued on was charged in the account as one of the items thereof, and the account was liquidated by a bond of the said Settle.

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Saunders.

On this state of facts the question arises whether the acceptance of the bond of Settle, one of the partners, was an extinguishment of the simple contract debt on which suit was brought.

It is manifest that the bond was obligatory upon the partner who executed it, and extinguished the simple contract as to them. It is like the case of a release, which if given to one joint debtor, discharges both. A bond given for a simple contract debt operates as a release of that debt, and makes another of a superior dignity, which is binding only on him who executed it. In the case of *Tom v. Goodrich*, 2 J. R., 214, one of five partners executed a bond for duties due the United States on the importation of goods, and it was held that all contracts and liabilities in relation to the duties were extinguished by the bond which the partner had executed. So in the case of *Clement v. Brush*, 3 John. Cases, 180, one partner executed a bond for a partnership debt, and the creditor afterwards executed a release to the other partner of all claims and demands against the firm, it was held the bond was an extinguishment of the prior simple contract debt, and was the sole liability of the partner who had executed it, and was not therefore affected by the release given to the other partner of all partnership demands. The principle of these decisions is sanctioned by Judge Washington, in the case of *the United States v. Astley*. 3 Wash. C. C. R., 508.

A bond given by one of several debtors for a debt due by simple contract, is an extinguishment of the simple contract debt, and becomes the sole debt of him who executed the bond.

It is clear that the bond was accepted by the appellees: the bill of exceptions shows that suit was brought on it by them, and a judgment recovered; nor is there any room to doubt but that the defence set up by the appellant's was available under the plea of *nil debet*, for it is

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v.
Shephard.

settled that under that plea, any defence, but a set-off or the statute of limitations, may be admitted in evidence.

Chitty, 517.

Judgment reversed.

ORME V. SHEPHARD.

A middle letter between the christian and surname is no part of the name, consequently its omission, or a mistake in its description, is immaterial.

Appeal from the St. Louis Court of Common Pleas.

DARBY AND KNOX for Appellant.

Opinion of the Court, delivered by Scott, Judge.

This was a suit by petition in debt, brought by Shephard against Orme, in which Shephard obtained judgment, from which Orme appealed to this court.

On the trial, Shephard offered in evidence the note sued on, which was signed, as the bill of exceptions shows, A. C. Orme, and the petition was against Augustus E. Orme. The reading of the note was objected to on the ground of variance. The objection was overruled, and the note read in evidence.

The appellant, to sustain his objection to the admissibility of the note, and to show its variance from the petition, has relied on the case of King v. Clark, 7 Mo. R. In that case the court held that a mistake in the middle letter between the christian and surname was no ground of variance; that it was no part of the name, and that the law knows of but one christian name, and the mistake of the middle letter of the name in that case was material, because the party had made it so by a descriptive averment. In the case of Smith v. Ross and Strong, decided at the last term of this court, it was held, the

omission of the middle letter between the christian and SEPT. TERM,
surname was no variance. 1842.

If the middle letter is no part of the name, as was held in Tallmadge v. Franklin, 5 John. 84, its omission, or a mistake in it, cannot be material.

Hardy
v.
The State.

Judgment affirmed.

HARDY V. THE STATE.

1. It is error to instruct the jury that they are the judges of the law and the evidence. The jury are to decide according to the evidence, as they receive it from the witnesses, and the law as delivered to them by the court.
2. The circuit court should not permit juries to take law books to their room for the purpose of investigating the law of the case; but they may be permitted to take a law book in their retirement, when the paragraph applying to the case is separately marked out, as in the case of a statutory provision.

Appeal from the St. Louis Criminal Court.

McPHERSON for Appellant.

BENT for Appellee.

Opinion of the Court, delivered by Tompkins, Judge.

The appellant, defendant in the criminal court, was indicted for permitting a gambling device, called a Roulette, to be used in his booth for the purpose of gaming for money.

The defendant being found guilty, appealed to this court. The appellant assigns as reasons for reversing the judgment of the criminal court:

- 1st. That there was no venue proved on the trial.
- 2d. That there is a variance betwixt the indictment and the evidence introduced to support it.
- 3d. That the court committed error in stating to the

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jury orally that the jury were judges of the law and the fact, when they requested the law book.

The evidence in the cause shows that at the fall races in 1839, the defendant was in a booth turning a roulette, at which other persons were betting; that money was won and lost at the table where the defendant was employed. There were several other roulettes in the booth, and it was not known who was the owner of the whole booth.

First, I believe it is no where stated in the record that this race track, or that the booth was in St. Louis county, but as it is not stated that the record contains all the evidence given, we may fairly presume that it was proved that the booth and race track were in St. Louis county.

The defendant prayed the court to instruct the jury, First, That unless the defendant owned or rented the booth, or had possession of it at the time specified, they must acquit. Second, That the setting up, or playing at the roulette table is a different offence from that charged in the indictment.

The court gave the following, in place of the first instruction asked: "That unless the jury believe from the evidence that the defendant owned or occupied the booth, or at the time had possession or control of it, they must acquit." The court refused the second instruction asked, and I hold it was very rightly refused. The court is not bound to give every idle instruction asked. Every body, without the aid of law knowledge, understands that. The evidence in this cause very plainly shows that the defendant had sufficient possession of this booth to maintain and keep up the roulette; the machine appears to have been under his direction and management; he had sufficient possession of the ground to ensure those disposed to bet, the right of entry and of tarrying. It is not very material what his title was to the soil on which the booth stood, or whether he was proprietor of the whole, or of a part only. He might very well have been guilty of both offences; and some future grand jury may per-

haps indict him for the offence of which he seems to think himself guilty. SEPT. TERM,
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It does not appear from the record that the jury was orally instructed by the court that they were the judges of the law and the evidence, as it is in the record, or of the law and the fact, as the defendant's counsel has it. It is difficult to conceive how the criminal court could consistently tell the jury they were the judges of the law, &c., after having undertaken to tell them what was the law of the case. It is the duty of the judge of a criminal court, as well as of all other courts of record, to instruct the jury in all the law arising in the case, and it is the duty of the jury to respect the instructions of the court as to the law of the case, and to find the prisoner guilty or not guilty according to the law as delivered to them by the court, and the evidence, as they receive it from the witnesses, under the direction of the court. Hardy
v.
The State.

It is error to instruct the jury that they are the judges of the law and the evidence. The jury are to decide according to the evidence, as they receive it from the witnesses, and the law as delivered to them by the court.

See 4 Bl. Com. p. 361.

The court and jury are colaborers in a cause: the court aids the jury by communicating to them its law knowledge as occasion requires; and the jury are to decide on the truth or falsehood of statements made by witnesses. When a jury find a man guilty of murder, they are said to decide the law and the fact. They apply the law given to them by the court to the facts proved by the witnesses; and if they find the prisoner not guilty, the State can no longer prosecute him on the same charge: but if the jury mistake the law, and find the prisoner guilty, the humanity of the law authorizes the court to correct the blunders of the jury by a grant of new trial. A court, therefore, ought not to allow juries to take books to find law to suit the case. But I see no impropriety in the court permitting a jury to take a law book in their retirement, when the paragraph applying to the case may be separately marked out, as in the case of a statutory provision. The circuit court should not permit juries to take law books to their room for the purpose of investigating the law of the case; but they may be permitted to take a law book in their retirement, when the paragraph applying to the case is separately marked out, as in the case of a statutory provision.

Because, then, the criminal court told the jury they were the judges of the law and of the evidence, and permitted them to take the book with them to the jury room, its judgment is reversed.

SUPREME COURT OF MISSOURI,

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STEPHENSON V. SMITH.

Stephenson
v.
Smith.

1. In chancery. An application was made to enter lands with the United States' Register and Receiver. The clerk in the offices, who was acting both for the Register and Receiver, delivered to the applicant an informal and void certificate of entry, and made out a formal certificate in the name of another, which he retained in his possession. On this certificate an assignment, with a blank for the name of the assignee, was executed in the name of the person mentioned in the certificate of entry. The clerk in the offices sold the land described in the certificate to one S., and inserted his name in the blank in the assignment on the certificate. S. afterwards procured a patent for the land from the United States. Held, that under the circumstances S. was not a bona fide purchaser: that the title he procured from the United States ensured to the benefit of the applicant to enter the land, who paid the purchase money.
2. Although the validity of a patent cannot be questioned in a collateral proceeding, yet, if one enters lands of the United States with the money of another, in his own name, and procures a patent for the same from the general government, a court of equity will decree the title to him to whom the money belonged. Such a proceeding does not invalidate the patent, but recognizes its validity.
3. The State courts have jurisdiction of causes instituted for such purposes, and a decree compelling the fraudulent patentee to convey to the equitable owner, does not violate the compact between this State and the United States, by which the State binds herself to abstain from passing any law interfering with the primary disposal of the soil by the United States; and with any regulation Congress may find necessary for securing the title in such soil to the bona fide purchaser.

(Tompkins, Judge, dissenting.)

Error to the St. Charles Circuit Court.

CAMPBELL AND GAMBLE for Plaintiff.

BATES for Defendant.

Opinion of the Court, delivered by Scott, Judge.

This was a bill in chancery, filed by Nancy Smith against Thomas Stephenson and James Coleman for an injunction and relief. The bill stated that the plaintiff, Nancy Smith, in the year 1829, at the United States land office, in St. Louis, entered a large quarter section of land, situated in the county of St. Charles. She was, at the time of the entry, and ever since has been, in pos-

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session of the said tract of land. At the time of making the entry, James Coleman, one of the defendants, was acting as agent or clerk both for the register and receiver. It being inconvenient to go in person, she sent her son to the office, who paid to Coleman the purchase money, for and in the name of his mother. Instead of a regular certificate of entry, Coleman fraudulently delivered to her son, who was so illiterate as to be unable to read writing, a paper of which the following is a copy.

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Stephenson
v.
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RECEIVER'S OFFICE, *St. Louis, Mo.* }
October 6, 1829. }

No. 1891. Received from Samuel Johnson, of _____ county, Ky., the sum of one hundred dollars, — cents, being in full for the west $\frac{1}{2}$, S. E. $\frac{1}{4}$ of section No. 17, of township No. 47, range No. 2, E., containing 80 acres, at the rate of \$1.25 per acre. \$100.

JAMES COLEMAN,
For the Receiver.

And with his own hand wrote upon the back of the receipt a memorandum, of which the following is a copy :

"The patent for the within W. $\frac{1}{2}$, S. E. $\frac{1}{4}$, sec. No. 17, 47, 2 east, containing 80 acres, will issue in the name of Nancy Smith, of St. Charles county, Mo.

JAMES COLEMAN,
Land Office, 5th Dec. 1829.

Her son received the paper, not suspecting any fraud, and returning home delivered it to her. She being unable to read, did not doubt but that the receipt was regular, and that in due time she would receive a patent for the land which she had thus purchased. The bill then charges that there was no such person as Samuel Johnson, named in the receipt; that it was a mere name assumed by Coleman to effect his fraudulent purpose. In pursuance of that purpose he made out a regular certificate of entry in the name of Samuel Johnson, bearing the same date with the receipt above mentioned, which was

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signed by the proper officer. (It appearing to be the practice of the office for the receiver to sign blank receipts and certificates, and leave them with his clerks.) On the certificate of entry, the said Coleman wrote an assignment under seal, with a blank for the name of the assignee, which purported to be executed by Samuel Johnson: Coleman, being a notary public, also wrote an acknowledgment of the assignment, which was duly authenticated.

Coleman afterwards left the State of Missouri, and went to Kentucky, when he sold the land in controversy to Thomas Stephenson, one of the defendants, and delivered to him the certificate of entry, first inserting his name as assignee in the blank in the assignment. Stephenson afterwards, in October, 1834, obtained a patent for the land in his own name, as assignee of Samuel Johnson, and instituted an action of ejectment against the plaintiff. The bill prays for an injunction, and that the title to the land may be decreed to pass to the plaintiff, and that the patent may be delivered up, &c. The answer of Stephenson denies all knowledge of the fraudulent conduct of Coleman, or of any of the transactions which preceded his purchase. Denies that Nancy Smith entered the land in dispute, or that she has any title thereto, legal or equitable. He purchased the land under the following circumstances. Many years ago he was acquainted with Coleman, in Kentucky, where they both resided. That Coleman becoming insolvent, went to St. Louis, leaving many debts unpaid in Kentucky. In the year 1834 Coleman returned to Kentucky, where he again met with him. Being desirous to make arrangements to migrate to Missouri, Coleman informed him that he had the disposal of several tracts of land in that State, and would be glad to sell him as much as would make a good farm. Upon Coleman's representations, he agreed to purchase the land in dispute, together with another tract of eighty acres, for the sum of one thousand dollars. At the time of the purchase he was informed by Coleman that the title was not in himself, but in the name of S.

Johnson, a friend of his, who resided in Kentucky or Missouri; that he held the certificate of entry, the usual paper given to those who enter the public lands, as evidence of the fact, and that for the convenience of conveyance, the said Samuel Johnson had regularly executed and acknowledged a blank assignment of said certificate; that the blank was left for the name of the purchaser, and that he, Coleman, was fully empowered to fill the same. It was agreed between him and Coleman, that the purchase money should not be paid until it was ascertained whether a patent would issue in his, Stephenson's, name. Coleman filled up the blank in the assignment, and delivered it to him. He believed the certificate of entry had been assigned in that manner by Coleman in order to prevent being harrassed by his old debts in Kentucky. He believed the land had been fairly entered by Samuel Johnson, and that Coleman was fully authorized to dispose of it. To be entirely guarded against the possibility of any fraud, or mistake, or defect of title, or authority, he determined to make inquiry as to the title at Washington City; and after fully stating all the circumstances under which he became possessed of the certificate of entry, to the Commissioner of the General Land Office, he was informed by that officer that a patent would issue in his name, as assignee of Samuel Johnson. In October, 1834, he received a patent for the land in controversy, having previously paid Coleman the purchase money, and afterwards commenced his action of ejectment. He denies all knowledge whatever of the title of the plaintiff. Coleman never answered the bill, and it was taken for confessed as to him, after proof of service by publication.

On the hearing of the cause, the original receipt given by Coleman to Nancy Smith, and the original certificate of entry in the name of S. Johnson, and the assignment thereon were produced. Two witnesses were introduced, who being well acquainted with Coleman's hand writing, from having seen him frequently write, were confident that the said papers were in the hand writing of Coleman. That the sig-

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nature purporting to be Coleman was his; and although the signature Samuel Johnson, subscribed to the assignment on the certificate was simulated, yet from points of resemblance between it and the genuine hand writing of Coleman, they believed it to be his: that Coleman did business in the land offices for both the register and receiver. Those officers were in the habit of signing, in blank, the necessary papers which were filled up by Coleman, and delivered to the purchaser of the public lands: that Coleman was discharged by the land officers on account of imputations of fraud against him on the account of the officers. The witnesses did not recollect whether Coleman was in the office or not in the year 1829.

Another witness was produced, the son of the plaintiff; he testified that his mother, some short time before she entered the land, became apprehensive that another would enter it: she had not the money and could not obtain it. It seems then a brother of the plaintiff went to St. Louis and made some arrangement by which her apprehensions were quieted. The witness further testified, that some few weeks after, at the instance of his mother, he went to St. Louis to enter the land. He was informed by his mother's brother, who had previously been to St. Louis on that business, that he would have some interest to pay on the money; and that if he paid the money and interest he would get the certificate. He paid Coleman one hundred and ten dollars for the land and interest. Coleman took the receipt, a copy of which has been set out above, and wrote the memorandum thereon. That he was unable to read writing, as was likewise his mother; and it was some years after that they were apprised of the fraud committed by Coleman, and of the claim of another to the land.

On the hearing the court decreed for the plaintiff, from which an appeal has been taken to this court.

The first point made by Stephenson's counsel is, that Nancy Smith does not show any title or claim, legal or equitable, such as will enable her to contest the right of Stephenson; or, in other words, there is no evidence that she ever entered the land in dispute. This objection will make

it necessary to offer some observations on the testimony preserved in the cause. Nancy Smith being fearful another would enter the land, prevailed on her brother going to St. Louis to do something by which it might be prevented. On the return of her brother her fears were quieted; and her son was informed by her brother that he would have something to pay for the money, and when the purchase money and interest were paid he would get the certificate: that he paid the purchase money, and ten dollars for interest a few weeks afterwards. The inference drawn from these facts is, that Coleman loaned the money when Mrs. Smith's brother went to St. Louis, and that the entry was made at that time; and in order to secure himself, Coleman made out the certificate of entry in the name of Samuel Johnson, which was to be assigned upon the payment of the loan and interest. Mrs. Smith's son says, Coleman took the receipt from him and endorsed the memorandum: the receipt and certificate of entry bear the same date; the memorandum bears date some weeks after the receipt. These circumstances strengthen the inference deduced from the facts above stated. Coleman might or might not have contemplated a fraud when the loan was made: he certainly placed it in his power to perpetrate one, had he been so minded. Then the receipt and the certificate of entry bear the same date, and on the receipt is the acknowledgment of Coleman, that Mrs. Smith will be entitled to the patent for the land. Does not those circumstances show all to be one transaction, and that the money of Mrs. Smith entered the land. When we take in consideration the testimony of the two witnesses well acquainted with the hand writing of Coleman, who believe that the signature of Samuel Johnson is the act of Coleman; the admission contained in the answer of Stephenson, that he was informed that Johnson resided in Kentucky or Missouri, as if it was unknown in which of these States he lived; the blank, in the receipt delivered to Mrs. Smith, for the name of the county in which he resided in the State of Kentucky, as if a friend should probably be ignorant of the county in which his friend lived with whom he corresponded; the fact that the certificate of

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An application was made to enter lands with the United States' Register and Receiver. The Clerk in the offices, who was acting both for the Register and Receiver, delivered to the applicant an informal and void certificate of entry, and made out a formal certificate in the name of another, which he retained in his possession. On this certificate an assignment with a blank for the name of the assignee was executed, in the name of the person mentioned in the certificate of entry. The clerk in the offices sold the land described in the certificate to one S. and inserted his name in the blank in the assignment on the certificate. S. afterwards procured a patent for the land from the United States. Held: that under the cir-

entry was never delivered to him, and that such a person has never been heard of since claiming any right to the land, we must adopt the conclusion of the plaintiff, that Samuel Johnson is a mere name assumed by Coleman.

The purchase money then, having been paid by the plaintiff, a trust to the land resulted to her, although the entry was made in the name of another, whether that person was real or fictitious. No principle of equity law is better established, than that if a party purchase land in his own name with the money of another, a trust will result to the owner of the money, and he will be regarded in equity as the real owner, although the legal title may abide with the purchaser; *Botsford v. Burr*, (2 J. C. R. 409;) *Stene v. Stene*, (5, J. C. R. 2;). *Fonblanque*, 116.

If then there was a resulting trust to the plaintiff; if she is in equity regarded as the real owner of the land, did Stephenson acquire a title under such circumstances, as will induce a court of equity to refuse its aid against him? or, in other words, is he a bona fide purchaser for a valuable consideration without notice? Stephenson in his answer says, he believed he was really purchasing from Johnson. He acquired no right under Johnson, admitting he was the real owner; for a parol authority would not have warranted Coleman in inserting his name as assignee. The act was void, and conferred no title whatever on Stephenson.

The assignment with a blank for the name of the assignee, was a mere nullity; it acquired no validity until it was filled up, and that must have been done by Johnson himself, or by some person, as it was a sealed instrument, who was empowered by authority under seal-Paley on Agency, 133. But if Johnson is to be regarded as a fictitious person, and Stephenson as the vendee of Coleman, does he not stand before the court under such circumstances as will induce it to strip him of the character of a bona fide purchaser, for a valuable consideration without notice? Stephenson admits, that he believed the circuitous mode adopted by Coleman to transfer the land, was prompted by a desire to shield the land from his creditors. The principle is well established,

that whatever puts a party upon inquiry is good notice in equity. *Green v. Slayter*, 4 J. C. R. 46; *Steny v. Arden*, 1 J. C. R. 267. Another head of presumptive notice is, where the law imputes to a purchaser the knowledge of a fact of which the exercise of common prudence and ordinary diligence must have apprised him. *Newland's Equity*, 511. Was not the fact of a blank having been left in the assignment for the name of the assignee sufficient to excite his suspicions? But he says he believed that mode of transfer was employed by Coleman to protect the land from his creditors. Where, then, is his good faith in aiding Coleman to give effect to a device to defraud his creditors; and if he be believed, that Coleman was defrauding his creditors, and it turns out that some other party than a creditor was the victim of his contrivance, would a court of equity hear him urging such a defence? Common experience must have informed him that men whose purposes are honest and fair, do not usually adopt so sinuous a course; and no man who purchases from another under such circumstances can be said to act with good faith. The land was described in the certificate. By suitable inquiry, he could easily have ascertained whether or not it was claimed by another. He would have learned another was living upon it. None of these precautions were taken.

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circumstances S. was not a bona fide purchaser: that the title he procured from the United States ensured to the benefit of the applicant to enter the land, who paid the purchase money.

That part of the answer which speaks of the consideration paid for the land, is well calculated to excite mistrust as to its truth. In the body of the answer he avers he gave one thousand dollars for the land in dispute, and another tract of eighty acres. In the answer to the interrogatory, What was paid for the land? there is a blank for the consideration. He does not tell us what kind of land the other tract of eighty acres was, whether it was improved or unimproved we are left to conjecture; and he never saw the eighty in dispute, until after the purchase was made. Is it not strange he should give one thousand dollars for two tracts of eighty acres each, of which he knew nothing. When the certificate of entry informed him that one of the tracts, a

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Although the validity of a patent cannot be questioned in a collateral proceeding, yet if one enters lands of the United States with the money of another, in his own name, and procures a patent for the same from the general government, a court of equity will decree the title to him to whom the money belonged. Such a proceeding does not invalidate the patent, but recognizes its validity.

few years before had been purchased for one hundred dollars. But he has never shown what he gave for the tract of land in controversy. He gave a thousand dollars for that tract and another. The other tract may have been worth the money, and this may have been had for nothing. Certainly courts of equity do not presume that a party is a purchaser for a valuable consideration without notice; he must show it, although it is not charged against him. *Frost v. Buckman*, J. C. R., 302.

The next point is, that the patent issued by the government of the United States for the land in dispute, cannot be cancelled or set aside in this mode; but it must be by scire facias, or bill in equity, in the name of the United States.

This objection cannot find a ground for its existence in the record. The bill does not seek to avoid the patent, nor is the decree of the court below that it shall be avoided or cancelled. It may be conceded that a patent cannot be avoided in a collateral proceeding; nor, unless it is absolutely void, can a party in any action or proceeding in which the patent may be used for evidence, or any other purpose, avail himself of any fraud, mistake, or circumstance by which it may be rendered void in a suitable mode of procedure. It can only be avoided at the instance of the government issuing it, by a direct proceeding for that purpose; a scire facias or bill in equity in the name of the authority from whom it emanated.

This is not an attempt to cancel a patent. The party who really paid the government for the land, and who is in equity entitled to it, asks that the legal title may be taken from him who has inequitably acquired it, and bestow it on the real owner. Nothing is more frequently done by courts of equity than to take the legal title from one who has improperly obtained it, and annex it to the equitable title of another. If a party should entrust an agent with money to purchase a tract of our saline lands, or a sixteenth section, and he should make the purchase, and take a patent in his own name, would our courts of equity hesitate to strip him of the legal title, although acquired by patent, and

invest it in the individual advancing the money? 5 Randolph, 479, Norvell v. Caurm; 6 Morn., French v. Loyal Company; Leigh, Taylor, and Quarles v. Brown, 5 Cranch, 243; Bodley v. Taylor, 5 Cranch, 191

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If this is the principle by which our courts would be governed in relation to a patent under our own laws, we must inquire if there is any thing in the constitution or laws of the United States, which should prevent its application by the State courts to patents emanating from the general government.

The judicial power of the United States, extends to all cases in law and equity, arising under the constitution, the laws of the United States, and treaties made, or which shall be made under their authority. Congress has not as yet conferred on the Federal courts as extensive a jurisdiction as was contemplated by the constitution of the United States. The circuit courts of that government have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, when the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs or petitioners, or an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State. This is a case of which the Federal courts have not original cognizance, although arising under the laws of the United States. The general government has not yet deemed it expedient to vest their courts with original cognizance of such causes: it is content to entrust their determination to the State tribunals, satisfied with the control of such causes as is conferred by the 25th section of the judiciary act, which gives a writ of error from the supreme court of the United States to the final judgment or decree in any suit, in the highest court of law or equity of a State, in which a decision in the suit can be had, when, amongst other enumerated causes, is drawn in question a title set up, or claimed under the constitution, treaties, or laws of the United States. The cognizance of this cause, then, belongs to the State courts, and they will determine it according to

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those principles of law and equity which prevail equally in the Federal and State courts. Our tribunals do not profess to be governed by any other rules and maxims, in the exercise of this jurisdiction, than those which would control the Federal courts, had they cognizance of the cause. Quoad this case our courts may be regarded as part of the judiciary of the Federal government. If our tribunals of justice, then, would not hesitate to decree a fraudulent patentee under our laws to convey his legal title to the equitable owner, and as in the cases above cited, we have seen the courts of the United States apply the principle to patentees under the State laws, what is there in the nature of a patent emanating from the general government, which should exempt it from this equitable control? We confess we can see nothing. We have seen that the Federal courts do not possess cognizance of such causes: we know the quantity of land yet to be entered in this State, and we know the numberless instances in which the purchaser is compelled to rely on agents to enter land for him. Shall our courts proclaim to all such agents that they may violate their trusts, enter the land in their own names, and bid defiance to their defrauded employers? Shall we give a premium to breaches of trust, and break down that salutary control by which courts of equity discourage fraud, in taking away all temptations to commit it? Shall it be said that an action on the case for money had and received, is the only remedy for such breaches of faith? and shall the dishonest grow rich with the wages of his iniquity, while our courts sit still, disarmed of the power of affording redress, by some mysterious reverence for a patent emanating from the general government? It is objected, that the act of congress authorizing the people of Missouri territory to form a constitution and State government, provides that the legislature of the said State should never interfere with the primary disposal of the soil by the United States, nor with any regulation congress may find necessary for securing the title in such soil to the bona fide purchaser; and that the State having expressed her assent to the said condition, by the tenth article of the State constitution, it would be a violation of the compact between the general government and this State, if her courts should

interfere and take away the title from him to whom it has been granted and vest it in another. SEPT. TERM,
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It has been shown that this is a case arising under the laws of the United States; and that Congress have not vested in these courts, original cognizance of this controversy. The title to the land has passed from the general government, and we are to determine to whom it should pass according to the laws of the U. States. In forming our judgment we are not influenced by any State law, but by the laws of Congress, and those principles of jurisprudence which would control the federal courts, had they cognizance of the suit. Was it intended that all wrongs committed under the laws of the general government for the disposal of the public lands should go unredressed? Can it be supposed that the general government ever intended, that the ministerial officers entrusted with the sale of the public lands, should disregard all legal restraints, and dispose of the lands as they pleased, without regard to individual rights secured under the laws; and that those acts should be protected from all judicial control? Here are two citizens of the State of Missouri; she owes them protection; one complains that the other has done him an injury; the court inform him, that the injury arises under the laws of the United States: we cannot therefore interfere. The Federal courts have no power to afford redress: they are then without remedy. Is this to be tolerated in a government of laws?

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The State courts have jurisdiction of causes instituted for such purposes, and a decree compelling the fraudulent patentee to convey to the equitable owner, does not violate the compact between this State and the United States, by which the State binds herself to abstain from passing any law interfering with the primary disposal of the soil by the United States; and with any regulation Congress may find necessary for securing the title in such soil to the bona fide purchaser.

The compact provides that the general assembly of the State, shall never interfere with the primary disposition of the soil, when the State courts assume jurisdiction of such controversies. It will not be pretended, that that will constitute an interference by the legislative department of our government. If that department should pass laws interfering with the disposal of the soil, and the State courts should enforce those laws, then a violation of the compact would be produced. Our courts in exercising the jurisdiction, are not influenced by State laws or regulations hostile to those of the general government. The State has passed no law on the subject; she has merely given her courts jurisdiction of all controversies arising between her own citi-

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zens; a controversy grown out of the laws of the United States, between those citizens and the United States, instead of providing tribunals to determine them, leave their adjustment to State courts, with a right of revision in the Supreme Court of the United States.

How can an assumption of this jurisdiction be deemed a violation of the compact, when in determining the controversies, whose cognizance we have assumed, we do not look to State laws or regulations for our guide, but to the laws of the United State, and to those principles of jurisprudence which would control the courts of the United States had they jurisdiction? We are in fact discharging a portion of the functions appertaining to the general government. Instead of acting in hostility to its policy and laws, we are humbly endeavoring to carry them into effect, in the spirit in which they are ordained. We cannot see any ground for the imputation that in affirming the judgment of the court below we violate our compact with the general government. Could we conceive that such a consequence would be the result of our decree, none would be more ready to abstain from it. We trust Missouri will always wear bright the chain which binds her to her sister States, and seek respect for her own rights in a scrupulous observance of the rights of others. The decree of the court below is affirmed.

Opinion of Tompkins, Judge.

Nancy Smith filed her bill in the circuit court of St Charles county against Thomas Stephenson, praying an injunction to stay proceedings in an action of ejectment in that court pending. She obtained a decree, to reverse which this appeal is prosecuted.

The case being of some importance in itself, as it affects the parties, and of infinitely greater importance, as it may, in its consequences, affect the interests of the community. I shall give at large the reasons which have induced me to dissent from the opinion of a majority of this court, affirming the judgment of a circuit court, over which presides one of the most enlightened and most worthy men in the State.

To this end it becomes necessary to make a full statement of ^{SEPT. TERM} the case, and particularly that the bill should be set out al- 1842.
most entire, and according to the letter.

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It is as follows:—Nancy Smith of the county of St. Charles, widow, humbly complaining, most respectfully shows, that on or about the 6th day of October, 1829, she entered and purchased, with her own money, of the public lands of the United States, at the United States land office at St. Louis, the west half of the S. E. quarter of section No. 17, of township No. 47 north, in range No. 2 east, containing eighty acres, at the rate of one dollar and twenty-five cents per acre: that she took possession of the said lot of land, and has ever since lived upon and cultivated the same, it being in the county of St. Charles. It is her only home, and except a small quantity of personal goods, her only property. For several years after the making the entry and purchase aforesaid, not doubting of the goodness of the title to her land, all the efforts of herself and several of her children, were devoted to the making of a farm; and she has succeeded in improving the same as much as most persons in her comparatively helpless condition. At the time of making the said entry and purchase, one James Coleman was clerk of both register and receiver of the land office at St. Louis, (which I am informed was irregular and improper, as said offices were designed by law to be a check upon each other, to prevent fraud and embezzlement,) and as such clerk conducted both offices. “I was a poor widow, and did with much exertion raise the sum of one hundred dollars to buy the land. As I lived forty miles from St. Louis, and could not conveniently attend in person to enter the land, I sent my son James Lewis to do it for me. He went to St. Louis, and taking a friend with him to the land office, entered the said tract of land and paid for it in my name. The said James Coleman, acting for the United States receiver of public monies in that land office, received the money. My said son being illiterate and unable to read, the said James Coleman, fraudulently practising upon his ignorance, as a pretended evidence of the payment of the money, and of the entry and purchase of the said lot of land in my name, gave him a receipt of which the following is a copy, to wit:

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No. 1891. Received from Samuel Johnson of _____ county, Kentucky, the sum of one hundred dollars, being in full for the west $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section No. 17, of township No. 47, range No. 2 east, containing 80 acres, at \$1 25 cents per acre, one hundred dollars.

JAMES COLEMAN, *for the receiver.*"

And with his own hand wrote upon the back of the receipt a memorandum of which the following is a copy, viz: "The patent for the within west half of the S. E. quarter of section No. 17, 47, 2 E., containing 80 acres, will issue, in the name of Nancy Smith of St. Charles county, Missouri, James Coleman, Land Officer, 5th December, 1829." My son being unable to read the receipt and memorandum, received the paper from the said Coleman and brought it home to me; and I also being illiterate and unable to read, received the same as satisfactory evidence of the purchase of the said land. And it was not until a considerable time thereafter, that I discovered the fraud that had been practised upon me, with this endorsement on the receipt. I, in my ignorance, remained satisfied, not doubting that I should get a patent for the land in due time. I am advised, and therefore state the fact to be, that the common and accustomed method of getting a final title for lands entered at the public Land Office, is to take a receipt from the receiver, for the money paid to him, a duplicate of which is sent by the register to the commissioner of this general land office at Washington City, who sends the patent to the purchaser, through the land office at which the entry was made. I am also informed and believe that it is lawful for the purchaser to present the receipt of the receiver to the register of the land office, and obtain from him a certificate of purchase, which being presented to the commissioners of the general land office at Washington City, entitles the purchaser to a patent. The said Coleman being clerk of both the register and receiver of the land office at St. Louis; and as I am informed and believe, and therefore charge to be true, also a public notary, relying upon my ignorance and helplessness,

proceeded formally to the execution of his plan, to cheat me of my land. I am informed and believe, and therefore charge that the facts are as follows: The said supposed Samuel Johnson, in whose name the receipt was nominally given is a fictitious person, and never had existence in fact. Said Coleman, in the name of the register of the land office at St. Louis, issued a certificate for the said half quarter section of land in the name of said Samuel Johnson, and kept possession thereof himself: he then forged and made an assignment of the said certificate in the name of Samuel Johnson, without naming any one as assignee, but leaving a blank for the insertion of a name, when and how it might best suit his fraudulent purposes. Then as notary public he wrote an acknowledgment of the assignment, purporting to have been made by Samuel Johnson, and attested and certified the same as taken and made before himself as a public notary, all of which proceedings were completely contrived and done by said Coleman, and were simulated and fraudulent and false. The said Coleman carried the said certificate to Kentucky, and there sold and delivered the same to one Thomas Stephenson; but at what precise time, and for what price, and under what circumstances I am not informed. But I charge that there was no such person as the Samuel Johnson mentioned in the receipt, and in whose name the aforesaid false and forged assignment was made: that it was by that false and forged assignment that the said Stephenson claimed the title to the certificate and now claims my land: that the said assignment was in blank at the time of the bargain made by Stephenson for the purchase of the certificate from Coleman, and was filled up with Stephenson's name as assignee of Samuel Johnson after the contract was made, but whether filled up by Stephenson or Coleman I do not know. The said Stephenson having obtained possession of the said certificate in manner aforesaid, sent the same to the general land office at Washington City, and on or about the 16th day of October, 1834, obtained a patent for the said half quarter section of land in his own name as assignee of Samuel Johnson; and relying upon that patent as a title, he has brought a certain action of ejectment against me to recover

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possession of the said half quarter section of land, which action is now pending in the circuit court; and I am now in danger of being turned out of the possession of the land which I have honestly bought and paid for, and improved by the labor of my family, and that by means of fraud, falsehood and forgery. I expressly charge that I alone have paid the money to the United States for the said land, and that I am the true and original purchaser thereof. That the said supposed Samuel Johnson is a fictitious person, the use of whose name by Coleman was a base fraud: that the pretended assignment of the certificate of purchase in the name of Johnson, and the certified acknowledgment thereof, were corrupt fabrications by Coleman without any truth or reality in them: that Stephenson bought the said certificate from Coleman and not from Johnson, and that he is not in law or equity the assignee of said certificate, nor of the rightful claim to the said land: that the patent issued for the said land to the said Stephenson, was issued by the officers of government by mistake, and upon false information as to the fact of the case, and ought not in equity and good conscience to enable said Stephenson to disturb me in the possession and enjoyment of the said land; and his attempt to do so is against equity and justice."

The complainant puts many questions, and amongst them asks what price Stephenson paid for the land. Coleman was not found, and a decree was entered against him for want of an answer: Stephenson answered, denying all knowledge of the situation and circumstances of the plaintiff and of her transactions with Coleman; admits that he bought the certificate from Coleman, and that it was endorsed in blank, and that the blank was filled by Coleman. He states that he bought the land in controversy, and another half-quarter section, for one thousand dollars; and afterwards says, that he did purchase the said certificate from Coleman for the price of —, as above stated, and he had only stated the price of that land and of another half-quarter section, as had been above stated.

Many other statements are made in the answer, and as irrelevant and impertinent as some of those in the bill of

complaint; all of which will be passed over, as it is not contended that the bill is not sufficiently denied, so far as the defendant can be charged with a personal knowledge of the facts, except as to the price he paid for the certificate. It is stated in the bill of exceptions that the complainant introduced as evidence the original patent certificate of purchase of the tract of land in question, purporting to be in favor of Samuel Johnson, signed by William Christy, the register of the land office at St. Louis, which was admitted to be genuine and was introduced as evidence without objection. It is as follows:

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Land Office at St. Louis, Mo. }
6th Oct. 1829. }

No. 1891.

It is hereby certified that in pursuance of law, Samuel Johnson, of Kentucky, on this day purchased of the Register of this office, the lot or west half of the S. E. quarter of section No. 17, of township No. 47, north, in range No. 2, east, containing eighty acres, at the rate of one dollar and twenty-five cents per acre, amounting to one hundred dollars, for which said Samuel Johnson has made payment in full, as required by law. Now, therefore, be it known, that on presentation of this certificate to the Commissioner of the General Land Office, the said Samuel Johnson shall be entitled to receive a patent for the lot above described.

W. CHRISTY, Register.

The complainant then introduced as evidence, a paper purporting to be an assignment of said certificate to said Thomas Stephenson, signed Samuel Johnson. This will not be here set out, as it is but a common assignment. It is further stated that the plaintiff gave in evidence an acknowledgment of said assignment, purporting to have been made by said Samuel Johnson before said James Coleman, Notary Public. After these three papers follows this certificate: "I hereby certify that the foregoing are true copies of the original on file in the general land office." To this certificate are subscribed two names, and it is dated the 14th March, 1838.

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The receipt, of which a copy with its endorsement was inserted in the bill and above copied, was also given in evidence.

It is then stated that the complainant introduced two witnesses, Wm. N. Fulkerson and Edmund Christy, who testified that they were well acquainted with the hand writing of James Coleman; that they have frequently seen him write, and the writing and filling up of all said papers they believe confidently to be in the hand writing of said Coleman; that all the signatures of said papers which purport to be in the hand writing of said James Coleman, are his genuine hand writing; that as to the signature of Samuel Johnson, they are not so confident, but that they believe it to be in the hand writing of said James Coleman, that it differs from the general hand writing of said Coleman, and is evidently an unnatural hand writing, but that there are points of resemblance betwixt it and the general hand writing which induce them to believe that it was written by him.— Said papers were all then read in evidence. The said Christy also testified that the said Coleman did the business in the office of both register and receiver of public moneys at St. Louis for many years, but that he does not recollect whether he was acting in the year 1829; that the law does not recognize any deputy for either the register or the receiver, but that said Coleman staid in the office, and transacted the business for them; that the said officers were in the habit of signing blank receipts and certificates, which were filled by said Coleman, and delivered by him to such persons as came to purchase lands; that the register and receiver being informed that he had been fraudulent, dismissed him from their employment; but that they had no positive knowledge that he was guilty.

The complainant then introduced James Lewis, her son, as a witness, who stated that in the fall of 1829, his mother had an improvement, and was living on the land in controversy; that some time during that fall, Mr. Joseph Allen came into the neighborhood, and was entering many tracts of land in the vicinity; that the complainant was in great trouble for fear that he would enter her improvement; that she had not the money to enter the land at that time, and

that she feared it might be entered by Mr. Allen before she could raise the money to enter it; that from conversation of complainant and her brother, Francis Biggs, (who is now dead,) he understood that she got Mr. Biggs, who was going to St. Louis, to see about it, and see if any arrangement could be made to save the land; that when Biggs returned, he learned from conversation of complainant, that Biggs had reported that he had made arrangements, and that the land could not now be entered by Mr. Allen; and that his mother was now satisfied and easy, believing that Mr. Allen could not enter it; that a few weeks afterwards the complainant got him to go down to buy the land for her; that Biggs told him he would have to pay some interest on the money, and that if he paid the money and interest he would get the certificate; that he did go down to St. Louis, and got a man named Joshua Clark to go with him, to show him the land office, and applied to Mr. Coleman for the land, and paid him one hundred dollars for the price of the land and interest; and that Coleman took the paper and wrote on the back of it a memorandum, and gave it to him, which paper is the same now here shown, signed James Coleman, for the receiver, with a memorandum thereon, signed James Coleman; that both he and his mother are no scholars; that his mother cannot read; that he can read a little print; knows nothing about figures; that both he and his mother then, and for many years afterwards, believed it to be a good title paper for the land, and did not hear of any other claim for several years afterwards, when Mr. Lindsay, the agent of Stephenson, had been paying taxes on it, and was inquiring for it, not knowing where it was, until he found to his surprise that it was the land whereon the complainant lived. In answer to a direct question to that effect, by defendant, witness stated that he, witness, supposed Mr. Biggs may have borrowed the money to enter the land when he went down, and that the money, one hundred dollars, which he paid, may have been to repay the money borrowed by Biggs, but he, witness, went down to purchase the land. Witness may have heard his mother say about that time, that Mr. Biggs reported, when he came back, that the land was already en-

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tered, but cannot recollect distinctly; he had fixed it some way that his mother was not so uneasy as she had been.

The defendant then gave in evidence the patent, which being in the usual form, will be omitted. There was no other evidence. I will first divest this bill of complaint of what, on reference to a master in chancery, where such an officer is found, would have been stricken out as impertinent, at the costs of the complainant, and will then proceed to consider the material part thereof, and the evidence produced by the complainant to support her claim.

She alleges that she is a widow; that she took possession of the land, and has ever since lived on, and cultivated it; that it is her only home, and except a small amount of personal goods, her only property; that not doubting the goodness of her title, she has for several years after making the entry and purchase, devoted all the efforts of herself and several of her children to the making of a farm, and the erection of the needful buildings on the land, and that she has succeeded in improving the same as well as most persons in her comparatively helpless condition. Here the complainant, impatient of the restraints imposed by the usual forms of bills in chancery, comes out like an actress, and after giving her opinion on the impropriety of the employment of Coleman to act for both register and receiver, exclaims, "I was a poor widow, and did with much exertion raise the sum of one hundred dollars to buy the said land. As I lived forty miles from St. Louis," &c., to the end. The two lectures on the law regulating the offices of the register and receiver, and the manner of obtaining a patent, if really the production of the complainant, shows her not to be so very ignorant as she pretends, and might retain their place for the novelty of the thing; but if the work of the solicitor, they and his authorities might more properly have been placed in his brief for the information of the court. Divesting the bill, then, of all this unimportant matter, and likewise of the abusive language so unmeaningly bestowed on Coleman throughout, for she has not pretended to make Stephenson a participator in the fraud, the material and substantive part of her complaint is this: that on the 5th day

of December, 1829, she, by her son and witness, James Lewis, applied to purchase the land in controversy; that her agent found at the land office a man named James Coleman, without authority to sell land, and paid the purchase money to him, and that Coleman, assuming to act in the name of the receiver, gave him a receipt for the same, signed James Coleman, for the receiver; and on that receipt endorsed an order that the patent should issue in the name of Nancy Smith, although the money appeared from the face of the receipt to have been paid by Samuel Johnson; that Coleman afterwards procured from the register the patent certificate, and having written an assignment on it in blank, signed by Samuel Johnson, and purporting to be acknowledged also by Johnson, before said Coleman, as notary public, sold it thus assigned in blank to Stephenson, at what price and under what circumstances she did not know. The evidence to support her claim to the patent certificate is, that on the fifth day of December, (two months, less one day, after the patent certificate issued,) she sent her agent to buy this land, and on that day he paid the money for the land; and this money she alleges is the money which the United States received as the price of that land. The time at which this money was paid according to her own showing, is the date of the endorsement made by Coleman on the receipt which he gave to her son and agent. It is not pretended that this date is wrong, and it is a part of her own evidence. This, then, is the time at which, according to her own testimony, the money was paid by her for the land, which, from her own showing also, must have been sold and paid for two months, (less one day) before, to wit, on the 6th day of October, 1829, the day of the date of the patent certificate.

All lands after the 24th of April, 1820, are sold for cash, and by the seventh section of the act of the 10th May, 1800, it is made the duty of the register of the land office to make entries in books, kept for such purpose, of all lands which persons apply to enter. See p. 460 and 770 of first volume of Land Laws. The complainant's money, then, did not pay for that land; if it did, either the patent certifi-

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cate must have borne a wrong date, or the endorsment on the receipt given in evidence by herself must have borne a wrong date, and in either case it was her duty to show the mistake, if any such there were. If the date of the register's certificate were wrong, that might easily have been corrected by the entry on his books. No such mistake being proved, it may be safely assumed that there was no mistake, and consequently that her money did not pay for the land. That fact being established, it is quite immaterial whether Samuel Johnson be a real or fictitious person. But her son and witness supposes that Biggs may have borrowed the money to enter the land when he went down, and that the sum of forty dollars which he paid, may have been to replace the money borrowed by Biggs; and he also may have heard his mother say, about that time, that Biggs reported when he came back that the land was already entered, but cannot recollect distinctly. He *fixed* it some how that his mother was not so uneasy as she had been. From such a train of suppositions as those, if we are to conclude that this land was purchased with her money, then no man's title to his land is safe, so long as a widow can be found not too modest to claim it, and with a son for a witness, of ingenuity sufficient to connect the train.

A part of the complainant's testimony is documentary, viz: The register's patent certificate, the assignment thereof purporting to be made and signed by Samuel Johnson, and acknowledged by him before Coleman a notary public. Stephenson had told us in his answer, that these had been forwarded to the commissioner of the general land office; and unless they had been, we know that the patent would not have been issued; such is the law as will appear in the sequel. The law also requires these certificates to be preserved on file by the commissioner of the general land office. These papers certified to be copies of the originals on file in the general land office, were given in evidence by the complainant; and we are told on the record that the original patent certificate of purchase of the tract of land in question, &c., signed by William Christy, register, &c., was admitted to be genuine. The assignment, acknowledgment, &c., were

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in like manner given in evidence, and the witnesses as above stated, proved the hand-writing of Coleman in all, whilst the record itself states that they were only copies. Independently of this record, these witnesses are known to me to be men of strict integrity. But they, and the learned counsel of Stephenson, had heard the bill of complaint read. In this bill the complainant had been made to exclaim, "I was a poor widow, and did with much exertion raise the sum of one hundred dollars to buy the land! I am now in danger of being turned out of my land which I have honestly bought and paid for, and improved by the labor of my family, and that by fraud, falsehood and forgery, &c." They seem to have imagined that it was the recital of tragedy in real life. The counsel apparently unconscious of his own natural powers, and overcame by the recital of such a tale of woe, instead of tearing the mask from the face of the actress, admitted that her's was truly a case well calculated to awaken our sympathies, and only insisted that her wrongs should not be redressed at the cost of his client. It may not then be a matter of surprise that the witnesses too were overcome by their feelings, and forgot to look at the papers before they testified.

I will, however, proceed to treat the subject as if there were no contradictory testimony; for I have no doubt that all the papers purporting to be executed by Coleman were so in reality; about the signature of the name of Johnson the witnesses spoke of hesitatingly.

The subject has been adverted to merely to show how their judgments have been influenced by this totally irrelevant and impertinent tale of woe wrought into this bill of complaint. But it was stated by the complainant's son that Mr. Biggs might have borrowed the money to pay for this land, and have entered it when he was down, &c. If so, then we must presume Mr. Biggs would have seen that a proper receipt or certificate, as the case might be, was made out; or was he also unable to read? The record does not say so. Where was the friend whom the complainant in her bill stated, that this son, witness and agent took with him to the land office? Could not he read? Could not he tell the

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agent what he was receiving when he took the paper from Coleman, which was then regarded as good evidence of title. This witness, ignorant and illiterate as he is represented, has shown more judgment than his mother in her bill of complaint. In his testimony he tells nothing about taking a friend with him to the land office. He says he got a man named Joshua Clarke to go along with him to show him the land office. It is probable they are one and the same person; but the witness more cautious than either his mother or her solicitor omits that epithet, and leaves it to be presumed that the man named Joshua Clarke having shown him the door of the Land Office retired, leaving himself and Mr. Coleman to themselves; and consequently it might not be thought strange, that this man was not called in to corroborate the testimony of the son in favor of the mother. Failing to find any thing more in the record about this friend, I referred to the complainant's statement furnished in pursuance of the 30th section of the act to regulate practice in the supreme court, &c., where I found these words: the bill alleges "that Coleman practising upon the ignorance of her son, gave him as evidence of the entry, a receipt in the name of Samuel Johnson; and upon that fact being discovered by a friend, said Coleman endorsed upon the receipt a memorandum importing that the patent would issue in the name of Nancy Smith." No such statement appears in the bill, nor any evidence of it on the record; and I apprehended that this friend, so called in the bill, but called by the witness a man named Joshua Clark, was not produced as a witness, because he might have proved something troublesome. To me it appears plain, that either this land must have been purchased by some one on the 6th day of October, or that it must have been withheld from sale by Coleman, by a pretended sale to Samuel Johnson for two months, till the plaintiff could raise the money in pursuance of a fraudulent agreement betwixt him and the complainant. The witness, her own son, stated that she got Mr. Biggs to go to St. Louis to see if any arrangement could be made to save the land; and that when Biggs returned, he understood from the complainant's conversation, that Biggs had reported he

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had made the arrangement, and that the land could not be entered, and his mother became easy. No arrangement of such a business could be honestly made. It would seem then, either that she corruptly agreed by her agent Biggs, to give Coleman ten dollars to withhold this land from entry till she could send money to buy it; and that the land was pretendedly sold to Johnson in pursuance of such corrupt agreement; or that it was honestly sold to him at the time the certificate bears date, in neither of which cases could she hope for any relief in a court of equity. Had this friend taken with him to the Land Office, (according to the bill,) been produced as a witness, I have very little doubt he could have proved something of the kind. If the complainant had not known what that receipt purported to be when she received it, she would probably too have resorted to some of her more learned neighbors to read it to her. Her son has demonstrated to my satisfaction, that he might have read that receipt: he could read some print, and after a lapse of eight years could designate Coleman's receipt, and knew it was signed James Coleman for the receiver, with the memorandum on it signed James Coleman. I find it difficult to believe, that had this bill been preferred by this Mr. Joseph Allen, who the witness seems to have intended to represent the spirit of speculation stalking through the land, that he would not have lost his cause; for I have rarely known a case where the plaintiff had as pressing occasion to charge fraud on others in order to divert attention from himself; and I can imagine nothing in this case, except the cry of fraud, widowhood, poverty, and the pretence of much honesty by the complainant, calculated to give her cause any appearance of justice.

I have hitherto treated this matter as if the United States, the grantor here, had been a simple individual vendor of this tract of land, and as if the State of Missouri had the right to declare the force and effect of titles granted by them, and power to enforce the right. To prevent the possibility of a doubt on this subject, the first section of the tenth article of our constitution declares in express terms, that the General Assembly of the State shall never interfere in the primary

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disposal of the soil by the United States, nor with any regulation Congress may find necessary for securing to the bona fide purchasers the title in such soil. In anticipation, I suppose, of this provision in the constitution the complainant makes these points :

1st. That the fraud and forgery of Coleman, acting for both register and receiver, cannot vest the title, legal or equitable, to any part of the public land in any other person than the purchaser.

2d. That the actual sale of the land to Nancy Smith is the primary disposal of the soil, and all subsequent mesne conveyances are to be judged of by the laws of the State.

The first point, so far as it goes to assert that the legal or equitable title to any part of the public land can vest in none but the purchaser, is a truism which I cannot see any use in stating; but why the fraud and forgery (if any) of Coleman is introduced, I am not able to see. The second point assumes the very thing in controversy, viz., that the land was sold to Nancy Smith, notwithstanding the patent, and we are cautioned against any slavish respect for the name of a patent, because the United States have no common law, and the whole matter of issuing patents being a mere official regulation, a patent cannot in the United States impart the sanctity of a grant by patent of a King of England, the President of the United States not being the owner of the soil. Without wasting time in so unprofitable an inquiry as whether a President of the United States has not as much property in their public lands as a King of England in their crown lands, or as any sovereign in Europe has in his crown jewels, which last we are told that the revolutionary leaders in France demanded and obtained, as the property of the nation, from Charles the Tenth, in July, 1730, when he was retreating from the kingdom, it may be safely assumed, that whether there be any common law of the United States or not, those States, the real as well as nominal grantors, are under as strong an obligation to observe good faith towards the purchasers of the public lands, and to protect them in their titles, as the crown of England towards its gran-

tees : and that a citizen of the United States has as much right to expect a good title to his land from the head of his government, and to be protected in that title by the courts, as a subject of the King of Great Britain has. Nor can I agree that the case would be altered now, if, as the complainant supposes, this whole matter of issuing patents were merely an official regulation ; but it is strictly a statutory regulation. By the seventh section of the act of 10th May, 1800, the register is commanded to give a certificate to the purchaser when payment is made, and on the production of that certificate to the proper officer, a patent will issue. Now, by the fifteenth section of the act of 26th March, 1804, the purchaser may apply to the register, and it will then be his duty under the ninth section of the act of 25th April, 1812, to transmit the certificate of purchase to the Commissioner of the General Land Office. Thence under the eighth section of the last recited act, the patent issues in the name of the United States, signed by the President of the United States, and countersigned by the commissioner of that office, being first recorded there, and it is then transmitted to the purchaser, through the land office where it was purchased. There stands recorded then in the General Land Office a patent to Thomas Stephenson for this land, and this court affirming the decree of the circuit court of St. Charles county, says, that the title to the said tract shall pass to and be vested in the said Nancy Smith, &c. If this court were by its decree to annul the patent, and order another to issue from the same office to Nancy Smith, the absurd assumption of jurisdiction would be obvious : but we having no superintending control over that special tribunal by which this patent is issued, say, that the officers have been cheated, and we decree the patent to Nancy Smith. The United States, vendors of this land (as they say) to Stephenson, assignee of, &c., being a sovereign power, and having courts to superintend and control their special tribunals, claim to have the mistakes of their agents inquired into in their own courts. They have admitted on record that

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there is such a man as Samuel Johnson, and in conscience are bound to refund the money if the defendant, Stephenson, be not made secure in his title : but if they are amenable to the State tribunals, and the acts of their officers, done within the sphere of their authority, are to be declared null and void, then they should have been summoned as defendants to the bill of Nancy Smith, widow.

If Stephenson were to transfer that land to a citizen of Illinois, and his vendee were to commence suit against the complainant in the circuit court of the United States, he might either procure an exemplification of the record from the General Land Office, or she might be commanded to bring into court the very patent which this court have declared shall pass to the complainant, and it is not to be imagined that that court would recognize the authority of the State courts to declare void titles to land granted by the United States. In *Wilcox v. Jackson*, 13 Peters, 511, Mr. Justice Barbour, delivering the opinion of the court, says, "that the acts of Congress have given to the register and receivers of the land offices the power of deciding upon the claims to the right of pre-emption ; that upon these questions they act judicially ; that no appeal having been given from their decision, it follows as a consequence that it is conclusive and inevitable. This proposition is true, he continues, in relation to every tribunal acting judicially, whilst acting within the sphere of their jurisdiction ; and even when there is such an appellate power, the judgment is conclusive when it comes collaterally into question, so long as it is understood." And the grant of the pre-emption in that case was declared void only because the register and receiver had granted it on lands which had been reserved from sale. In that case he cites at the same page, the case of *Elliott v. Piersol, et al*, 1 Peters, 340. Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding on every court. In the case of the U.

States v. Aredondo, 6 Peters, 691, it is said, "It is an universal principle that where power and jurisdiction are delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding and valid as to the subject matter; and individual right will not be disturbed, collaterally, for any thing done in the exercise of that discretion, within the authority and power conferred. The only questions that can arise between an individual, claiming a right under the acts done, and the public, or any person denying its validity, are power in the officer, and fraud in the party." In the case above cited, Mr. justice Barbour tells us, the acts of such tribunals, when they transcend their power, are nullities, and may be disregarded by all the world. Such is not the case here. The officers granting the patent acted within their sphere strictly, and if there had been an appellate tribunal, to that tribunal an appeal might have been prayed. But fraud is alleged: and if the patent were fraudulently obtained, by whom is that fraud to be inquired into? If such a patent had been fraudulently obtained from a State tribunal, (and we have had such,) nobody could suppose the courts of the United States were competent to inquire into the acts of their special tribunals, which acknowledge no subjection to our laws or courts? I have before shown that we have no power to annul the patent, or to order one to issue to the complainant. The result then is, that because the land lies within the State, we have it in our power to annoy Stephenson, without affecting his title. The respect which courts of different countries and sovereignties show to the decisions of each other, forbids our chancery court from interfering with the decisions of this special tribunal of the United States; and whether it be judicial, or ministerial merely, is, according to the authority of the case above cited from 6 Peters, immaterial.

But this special tribunal is judicial, it is a special judicial tribunal. The register finds the facts, and reports them to the President of the United States, and on the

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facts found and reported, he decides to whom the patent shall issue. In *Bagnell v. Brodinck*, the Supreme Court of the United States say, Congress has the sole power to declare the dignity and effect of titles emanating from the United States. And the whole legislation of the Federal Government in reference to the public lands, declares the patent the superior and exclusive evidence of legal title: until its issuance, the fee is in the government, which by the patent passes to the grantee, &c. Afterwards, it is added, that if the patent issued by mistake, then the equity side of the circuit court is the proper forum: and a bill the proper remedy to investigate the equities of the parties, 13 Peters, 450. And I will here add that the evident intention of the Supreme Court of the United States, was, that the validity of the patent could be inquired into only in the courts of the United States. Otherwise the validity of the patent in that case might have been inquired into under an act as well on the law side as the equity side of our courts. In this sense Mr. Justice McLean seems to understand it in his dissenting opinion.

I have now proved that the courtesies shown by courts of different sovereignties to the decisions of each other forbids us to intermeddle with the right of Stephenson. But when we consider that this court has no powers but such as are derived from the constitution and laws, and that our constitution has declared that the General Assembly shall never interfere with the primary disposal of the soil, nor with any regulation Congress may find necessary for securing the title in such soil to bona fide purchasers, and this Assembly has never attempted to make such regulations, it seems to me to be no less than usurpation of power in this court to say that they decree the title to pass out of the United States' patentee to the complainant, because they believe it to have been fraudulently obtained, when the tribunal for such purpose, appointed by the United States, have decided that it was fairly obtained. For the United States having adjudged this patent to Stephenson, by a tribunal appointed for the

special purpose of deciding such claims, I cannot conceive that the sovereignty of the State of Missouri confers on her courts any more authority to declare that decision erroneous, than the possession of Hercules and his bodily powers would confer on a hero of modern days to traverse the now known world, beating out the brains of each person whom he might decide to be a cheat, a thief, or a robber.

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That our State courts have not regulated their decisions according to the principle now contended for, I am ready to admit; and I admit also, that I have heartily concurred in at least one decision made contrary to the principle for which I have contended. For a long time after the transfer of this territory, of which the State is now a part, by France to the United States, we had very few if any complete titles to land. Our legislation was accordingly adapted to the then existing state of that kind of property. As early as the year 1816 a law was made requiring deeds and bonds for real property to which the vendor held the equitable title only, to be recorded; and making such deeds and bonds when duly recorded, constructive notice to subsequent purchasers of the same property. About the same time the legislature passed an act giving the action of ejectment to persons claiming such property by deed of conveyance, and ever since a similar act has been in force, and always so modified as to embrace the several new titles that at different periods came into existence. This could cause no conflict of judicial decisions, whilst, as under the territorial government, the chief judicial power was confined to courts created by acts of Congress. The necessities of the community required that many transfers of real property, held by incomplete titles, should be made; many suits were instituted for such property. The first case in this court that occurs to me, is that of Bird v. Ward and Cravens, 1 Mo. Rep. 398. Ward and Cravens made a settlement on lands of the United States, which, under the act of Congress of the 5th of February, 1813, entitled them to a right of pre-emption in the pur-

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chase of the land in controversy in that suit. They sold to Bird. He paid them, took possession, and made valuable improvements. Afterwards they procured from the register and receiver for their own benefit, an adjudication of the right of pre-emption. This court decreed the land to Bird. Such frauds were at the time very common, and justice required that they should be retained. The jurisdiction of the State court does not appear to have been questioned. There having been a contract betwixt the parties, I should have assented to the decree. But in this case there was no contract express or implied betwixt the complainant and the defendant. Stephenson did not know the plaintiff. Next in order comes the case of Morton v. Blankenship and Rider, 5 Mo. Rep., 346. In this case the holder of the patent certificate brought an action of ejectment against the holder of the patent for the same land, but under a junior certificate. This court decided that the evidence on the record did not justify the Commissioner of the General Land Office in vacating the first certificate, and directing the land to be sold afterwards to the holder under the patent, and consequently judgment was given against the holder under the patent. The case of Bagnel, et al. v. Broderick was decided in the Supreme Court of the United States subsequently to this case, and I will here add, that unless that court denies to the State chancery courts, as well as to its courts of law, the right to look behind the patent, I cannot see the wisdom of its decision. But I understand it as denying the power to the State courts both at law and in equity. In the cases of Hunter v. Hemphill, p. 106 of sixth volume of Missouri Reports, and in a case decided at St. Louis, not yet published, this court refused to look into the sales made by the registers and receivers to find whether they were regular. In Campbell v. Clark, it was contended by Clark, that he had the right to remove a quarter section corner, which, according to the testimony in the case, was not in the middle of the sectional line, and, in direct contradiction to the act of Congress on that subject, the circuit court instructed the

jury that if the quarter section corners on the several sides of the sections are not in the middle of the lines connecting the section corners, no regard is to be paid to them. This court reversed the judgment of the circuit court given for Clark, on account of that wrong instruction. In fact, we know very little of the laws of the United States, and are much more disposed to be censorious in passing on the conduct of their officers than we would be if we were in our legitimate sphere reviewing the acts of those over whom we have some superintending control.

In support of the jurisdiction of this court, in this case, the counsel for the complainant has cited the case of *Rogers v. Doe*, on the demise of *Barland et al.*, 1, *Peters* 656. That case was cited in *Bagnet et al. v. Broderick*; and also in *Wilcox v. Jackson*, 13th *Peters* above referred to; and in each case the Supreme Court of the U. S. said, "That was the case of a conflict betwixt two patentees, both claiming under the United States." The elder patent was founded on a certificate of the Register of the Land Office west of Pearl river. The junior patent was issued on a certificate of the Board of Commissioners west of Pearl river. The court below instructed the jury that the junior patent of the plaintiff in ejectment, emanating upon a certificate for a donation claim, prior in date to the patent under which the defendant claimed, would overreach the elder patent of the defendant, and in point of law prevail against it. It appears that by the mode of proceedings in Mississippi, they look beyond the grant. This court, remarking upon that case, said, "That in so doing, and in applying their peculiar mode of proceeding to titles, derived through and under the laws of the U. States, they violated no provisions of any statutes of the U. States;" 13th *Peters*, *Bagnet et al. v. Broderick*, 450-1; and *Wilcox v. Jackson* 517, *ibid.*

In the case now before us, there was a patent on the side of the defendant, which the complainant on the authority of that case contends, is to be overreached by the testimony of her son: that he paid money to a man found about the Land Office, without authority to give even a receipt for money.

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It was not attempted to show the application of the case, and I can perceive none, unless the complainant intends to insist that the evidence of her son, in her particular case, is to be accounted in this court of as high a character as a patent issued by the authority of the several acts of Congress above cited; that seems to be the drift of the argument of the cause, for I cannot persuade myself that her counsel believes, that a State court has any authority to superintend and control in their action the special tribunals appointed by the United States, to issue the patents to those to whom they have sold the land. To tell them that they are mistaken in the purchaser, is to tell them that they must believe others rather than their own records, (*i. e.*) in this case the plaintiff's pretendedly ignorant son, rather than the entries on their own books. Each sovereign reserves to itself the privilege of correcting the errors of its own servants, and regards it as an act of usurpation for another to assume that privilege.

The decree of the circuit court ought then, in my opinion, to be reversed, and the bill dismissed, because, 1st. There is, in my opinion, no evidence that the complainant's money paid for this land, the Register's certificate bearing date the 6th day of October, 1829, and by her own evidence her money was not paid to Coleman till 5th December next, after that time: 2nd. If her money did pay for that land, the certificate must have been issued two months before the money was paid, in pursuance of a fraudulent and corrupt agreement betwixt Coleman and her, through Biggs her agent; in such case she can have no claim: 3rd. Because this State courts have no power or authority, to decide on the correctness or incorrectness of the conduct of the officers of the United States who issue patents: 4th. Because, if the State courts will assume such power according to the rules of proceeding in chancery, the United States, the vendor to Stephenson, ought to have been made co-defendant in this suit.

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